FINAL INVESTIGATIVE REPORT

LOS ANGELES UNIFIED SCHOOL DISTRICT

BELMONT LEARNING COMPLEX

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EXECUTIVE SUMMARY

INTRODUCTION

This Executive Summary provides an overview of the analysis and conclusions presented in the Final Investigative Report regarding the Los Angeles Unified School District's Belmont Learning Complex project. This report has been prepared by the Los Angeles County District Attorney's Belmont Task Force on the completion of its investigation of the development and construction of the Belmont Learning Complex.

Given the importance of our children and their welfare, the District Attorney's Office has assigned the highest priority to a thorough analysis of this matter. After a comprehensive review of all relevant facts and legal issues, the District Attorney's Office concludes that the available evidence is insufficient to establish the existence of any felony violations of California law. However, the Office also concludes that the school district must learn the lessons of the Belmont Learning Complex project in order to avoid similar problems in future school construction.

This Executive Summary presents the essential findings of this report using the following organizational scheme:

- **Introduction**
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- **Conclusion**

INVESTIGATION PROCESS AND METHODOLOGY

The Belmont Task Force. The District Attorney's Belmont Task Force began the present investigation in February 2001. The Task Force was composed of senior prosecutors, investigators from the Office's Bureau of Investigation, representatives from a number of governmental agencies, and numerous environmental and construction experts. The Office also retained Geomatrix, Inc., a geo-technical environmental testing firm, to conduct an independent and definitive evaluation of environmental conditions at the project site. In addition, the Belmont Task Force was assisted by the Los Angeles Unified School District's Office of Inspector General, and various local and state authorities including the Department of Toxic Substances Control (DTSC).

The Task Force's mission. The Belmont Task Force's primary mission has been to conduct a thorough examination of the Belmont Learning Complex (BLC) project for possible violations of California criminal law. This mission is mandated by the role of the District Attorney's Office in our system of government, as the District Attorney's Office has the legal responsibility to determine whether felony crimes have been committed in the county and whether persons or entities should be criminally prosecuted.

The Belmont Task Force was charged with broadening the scope of BLC investigations that preceded it, to include not only environmental and fraud issues, but the wide array of other serious allegations that had been made. Accordingly, the Task Force's probe was both broader in scope and deeper in evidence-gathering than any previous investigation of the BLC project.

The investigation. The Belmont Task Force has completed a comprehensive review of all known facts and legal issues related to the BLC project. The Task Force issued 140 grand jury subpoenas, interviewed or obtained statements from 343 witnesses and sources, reviewed more than 1,100 banker's boxes of documents and 8,800 pages of building plans, and consulted outside experts and sources including some of the most ardent critics of the project.

BELMONT LEARNING COMPLEX: FACTUAL BACKGROUND

Downtown Los Angeles has long needed a new high school facility, as demographic changes have caused a population boom in this inner-city community. In the early 1990s the Los Angeles Unified School District (LAUSD) intensified efforts to select and acquire land in order to develop such a new high school facility.

The new high school, to be known as the Belmont Learning Complex (BLC), was planned to be LAUSD's flagship campus. The new school was to feature: a then-novel "mixed use" concept, including a commercial revenue-generating component and a low-income housing section; a "design-build" construction approach that would speed completion; and finally, generous athletic and recreational facilities to be jointly utilized by the school and the City Department of Recreation and Parks.

The factual background chapter in this report describes the development and construction of the Belmont Learning Complex — focusing on the major events in this complicated and protracted effort — and provides a factual context for the chapters addressing specific areas of legal controversy associated with the project.

RELEVANT LEGAL PRINCIPLES AND CRIMINAL STATUTES

Jurisdiction. The District Attorney's Office has jurisdiction to prosecute all felonies in Los Angeles County and misdemeanors in all unincorporated areas of the county. The Los Angeles City Attorney's Office prosecutes misdemeanors occurring within the City of Los Angeles, and the Belmont Learning Complex site is located downtown in the city. However, a related misdemeanor which is joined with felony charges in a single matter could be prosecuted by the District Attorney.

Applicable legal standards. The standard of proof in a criminal case is "proof beyond a reasonable doubt." The criminal process mandates the right to a jury trial and a unanimous verdict. District Attorney filing standards require that the available facts must satisfy the prosecutor that the accused is actually guilty, that there is legally sufficient and admissible evidence of the crime and its perpetrator, and that the evidence would warrant conviction by the fact finder after hearing plausible defenses.

Scope of the Task Force analysis. The Belmont Task Force has considered seventeen criminal and civil statutes — listed in Chapter II — in its evaluation of possible unlawful conduct in the development and construction of the Belmont Learning Complex. The primary focus of the investigation was on possible felony misconduct, although potential misdemeanors and non-criminal violations were also considered as appropriate.

ENVIRONMENTAL ISSUES

The Belmont Task Force examined the handling of various environmental issues that arose during the development and construction of the Belmont Learning Complex, primarily as a result of the project's proximity to a historical oil field.

The environmental issues. Issues have been raised of environmental contamination at the Belmont Learning Complex site, and of possible violation of environmental laws during construction at the BLC site. A part of the project site is located just inside the south boundary of the Los Angeles Oil Field, a shallow oil field extending across a wide area north of the downtown Los Angeles Civic Center. This oil field is one of numerous oil fields found in the Los Angeles basin, and this portion of the field was active primarily in the late 19th and early 20th centuries. (The BLC site straddles the boundary line of the Los Angeles Oil Field, and the principal student buildings — the school academy and gymnasium structures — were located outside the boundaries of the oil field.)

The environmental conditions in this oil field are common to many Los Angeles area properties on which commercial and residential buildings are located. The part of the BLC site in the former oil field had been primarily occupied by single-family homes and apartments for the past three generations, and the existing Belmont High School and Plasencia Elementary School have been located in part in the same oil field for decades.

Findings. Based on the findings of Geomatrix, Inc., and other environmental studies and data, the District Attorney's Office concludes that the site is not contaminated with hazardous waste as defined in California's Hazardous Waste Control Law. Naturally-occurring soil gases (methane and hydrogen sulfide) and naturally-occurring oil-impacted soils are present at the site as a result of the oil field, but those substances are not hazardous waste subject to the Hazardous Waste Control Law, and their presence will not support prosecution under California law.

The consensus of the environmental experts consulted by the Task Force is that the comparatively low levels of naturally-occurring gases and crude oil at the BLC site could be managed satisfactorily by installing a mitigation system, in the same manner as such conditions are managed at other similar building sites in the Los Angeles basin.

Prior to the shutdown of the BLC project, the project participants recognized this environmental concern and designed a mitigation system sufficient to meet known conditions. Judged by the legal and technical norms for remediation at such sites, LAUSD, Temple Beaudry

Partners, and Turner/Kajima acted in a reasonable manner in attempting to address the soil gas problems as they were discovered. Their conduct will not support criminal prosecution under the applicable legal standards.

BROWN ACT ISSUES

The Brown Act. The Brown Act, California's "open meeting law," requires that government agencies such as school boards conduct their business in public. Intentional violations of the Brown Act carry misdemeanor criminal sanctions.

Findings. Certain meetings of the LAUSD Board of Education during the period in question may have failed to comply with the requirements of the Brown Act. However, the necessary element of *intentional* misconduct cannot be established, in part because the Board relied on legal advice that Brown Act exemptions for "real estate negotiations" and "pending litigation" were applicable. Thus a key aspect of the proof necessary for a criminal prosecution is absent here.

Corrective action. As a result of the District Attorney's intervention in this matter shortly after he took office, the LAUSD Board now has modified its open meeting practices, and appears to be in full compliance with the requirements of the Brown Act. This development reflects the new priority assigned to Brown Act enforcement by the District Attorney as part of his greatly increased emphasis on public integrity issues.

DEVELOPER SELECTION ISSUES

The District Attorney's Office examined allegations that insiders subverted the developer selection process by illegally steering the developer contract award to the eventual winning bidder, thereby violating laws prohibiting conflicts of interest in public contracts (Government Code section 1090), as well as committing bribery and/or grand theft.

Conflict of interest findings. Conflict of interest charges cannot be sustained against attorney Cartwright or his law firm because Cartwright was not subject to Government Code conflicts requirements, as he lacked public officer standing or authority, and Cartwright and the firm had at most a "remote interest" exempted from those requirements. Further, LAUSD knowingly waived any potential conflict involving Cartwright.

Political practices findings. This Office concurs with the Fair Political Practices Commission that the evidence does not establish a violation of the Political Reform Act, because it was not "reasonably foreseeable," within the law's requirements, that Cartwright or his law firm would gain from the TBP selection. Further, there is no evidence that Cartwright or his firm realized the requisite financial gain from TBP's selection.

Bribery findings. The evidence is insufficient to prove that Kajima bribed or attempted to bribe LAUSD planning director Shambra, or that Shambra received a bribe from Kajima, because there is a legally viable alternative explanation of funds passing between them.

Grand theft findings. The evidence will not support prosecution for grand theft by false pretenses principally because: (1) there were no provable false pretenses relied upon by LAUSD; (2) LAUSD, the ostensible victim, relied on its own investigation by its Oversight Committee, which reliance would negate any arguable false pretense crime; and (3) there is no provable specific intent to defraud on the part of any of the parties.

SECURITIES LAW ISSUES

The District Attorney's Office has investigated the issuance of the securities (known as "certificates of participation" or COPs) used by LAUSD to finance the construction of the Belmont Learning Complex project to determine whether material misrepresentations or omissions occurred in violation of California corporate securities laws. It has been suggested that LAUSD misrepresented the prospects for tax-exempt status for the securities and misrepresented the environmental circumstances of the BLC project.

Securities law findings. LAUSD was fully committed to preserving the tax-exempt status of these certificates of participation — and has in fact preserved that status — and nothing in LAUSD's consideration of possible retail uses of the site meets the test of material omission under state securities laws. Similarly, environmental concerns about the BLC site also would not qualify as material omissions to the COPs investors, who were protected by payments and properties completely separate from the success or failure of the BLC project. In addition, there is no satisfactory evidence of the requisite fraudulent knowledge or criminal negligence on the part of any individual associated with the securities offering to support felony securities fraud charges.

Thus allegations of securities violations in connection with the offering and sale of the BLC certificates of participation cannot be supported by the evidence presented.

SUBCONTRACTOR BILLING ISSUES

The District Attorney's Office has reviewed the evidence to determine whether any of six subcontractors referred by the LAUSD committed grand theft or submitted false claims during the construction of the Belmont Learning Complex in the years 1998–1999.

The arbitrator's findings. After an extensive hearing process raising these issues, an independent arbitrator has considered and rejected LAUSD's claims of subcontractor wrongdoing — including essentially all the overbilling or false claims allegations referred to this Office for prosecution. LAUSD's appeal has been dismissed and that decision is now final. A prosecution on these same theories under the more stringent criminal law requirements has no reasonable prospect of success.

Overbilling and false claims findings. A review of the facts surrounding each claim of billing violations reveals that neither Turner Beaudry Partners, nor Turner/Kajima, nor the six subject subcontractors intentionally overbilled for work performed on the project. Instead, as the arbitrator concluded, LAUSD's breach of contract and its handling of the project shutdown were the principal sources of billing and payment problems. Thus there is insufficient evidence of intentional overbilling or false claims to support criminal prosecution of any of the contractors or subcontractors in the BLC project.

CONSPIRACY ISSUES

The District Attorney's Office has examined allegations of a large-scale criminal conspiracy involving most of the key participants in the Belmont Learning Complex project, including LAUSD employees, numerous principals and employees of developer Turner Beaudry Partners, construction firm Kajima, attorneys Cartwright and O'Melveny & Myers, and others.

Findings. The highly speculative theory of a large conspiracy of most of the key figures in the BLC project does not meet the stringent evidentiary requirements for a criminal conspiracy prosecution. Despite all the lengthy public and private inquiries into this matter, there is absolutely no direct evidence, from any purported co-conspirator, insider, or knowledgeable witness, of an

illegal agreement — the essential element needed to prove a criminal conspiracy. The absence of any such witness or document is a strong indicator that no such conspiracy existed.

Virtually every fact ascribed as potential "evidence" of such a conspiracy also has a reasonable non-criminal explanation, such as normal business motivations, good faith but mistaken business judgment, inexperience, or the unique circumstances of a novel project. The law requires the trier of fact to resolve such ambiguities in favor of defendants.

The evidence also fails to establish the required target crime, which must be the object of a criminal conspiracy, and this failure of proof is also fatal to such a conspiracy theory.

LESSONS FROM THE BELMONT LEARNING COMPLEX PROJECT

In the course of its criminal investigation, the Belmont Task Force has identified unsound practices and serious problems with the LAUSD school development process, although these problems will not support criminal prosecution in this matter. The Task Force has identified lessons to be drawn from the BLC project including the following:

• Because school development in our urban community is often complex and controversial, LAUSD must develop a more open and efficient process that promotes public confidence and withstands competing pressures;

• Full adherence to both the letter and the spirit of California's requirements for an open and public process is vital to restoring public confidence in LAUSD;

• LAUSD needs oversight in spending billions of dollars on public schools, and effective oversight by the LAUSD Inspector General is essential;

• Failure to assure environmental safety from the start will always jeopardize a school project, thus environmental safety issues must be fully resolved at the *planning* stages;

• New legislation giving the state Department of Toxic Substances Control clear jurisdiction over school site mitigation plans must be adequately implemented;

• LAUSD should be cautious with novel school design concepts, such as the "mixed-used concept" here, which are likely to be outside of LAUSD's expertise;

• The "design-build" approach caused serious problems in the BLC project and its use should be re-evaluated by the Board; if "design-build" is used again, there must be new protocols in place limiting the risks of that approach;

• Careful adherence to sound planning and environmental testing procedures, among others, is necessary to ensure full compliance with California securities law; and

• LAUSD development contracts must employ much greater clarity of terms regarding contractor payment schedules, front-loading of profits, and related issues.

CONCLUSION

The District Attorney's Belmont Task Force concludes that the available evidence fails to establish the existence of any felony violations of California law in the development or construction of the Belmont Learning Complex. Accordingly, prosecution is declined. However, it is crucial that the Los Angeles Unified School District apply the lessons from the Belmont Learning Complex and develop an improved school construction process which is open, thorough, efficient, and unquestionably honest.

INTRODUCTION

This report presents the analysis and conclusions of the Los Angeles County District Attorney's Office Belmont Task Force on the completion of its investigation of the development and construction of the Los Angeles Unified School District's Belmont Learning Complex.

Given the importance of our children and their welfare, the District Attorney has assigned the highest priority to a thorough analysis of the Belmont Learning Complex project. The District Attorney created the Belmont Task Force, comprised of senior prosecutors, investigators, and expert individuals and agencies of all kinds, to complete this important task.

The primary mission of the Belmont Task Force was to conduct a comprehensive examination of the Belmont Learning Complex project for possible violations of California criminal law. This mission is mandated by the role of the District Attorney is our system of government: to determine whether felony crimes have been committed in the county and whether persons or entities should be prosecuted.

To complete a thorough criminal investigation of this matter, the Belmont Task Force issued 140 grand jury subpoenas, interviewed or obtained statements from 343 witnesses and sources, reviewed more than 1,100 banker's boxes of documents and 8,800 pages of building plans, and consulted numerous outside experts and sources, including some of the most ardent critics of the project.

After completing this comprehensive review of all relevant facts and legal issues, the District Attorney's Office concludes that the available evidence is insufficient to establish the existence of any felony violations of California law. However, as detailed in the concluding chapter of this report, there are larger lessons of public policy to be drawn from the failed Belmont Learning Complex project — lessons which must be learned to avoid repetition of the mistakes which took place here.

With due respect for the importance and complexity of these issues, the District Attorney's Office has prepared this detailed report to provide a full and public description of the investigation and the findings of the Belmont Task Force. The report includes an Executive Summary providing an overview of the investigation and its conclusions, nine chapters addressing in detail the principal legal issues which arose regarding the Belmont Learning Complex, and a concluding chapter which presents important lessons from the Belmont Learning Complex project.

Chapter I

INVESTIGATION PROCESS AND METHODOLOGY

Chapter Synopsis

- The District Attorney's Office is charged with the legal responsibility of determining whether crimes have been committed and whether persons or entities should be criminally prosecuted. The Belmont Task Force was formed to meet that responsibility by conducting an in-depth investigation of allegations arising from the Belmont Learning Complex project.

- The Belmont Task Force was charged with broadening the scope of prior BLC investigations, to include not only environmental and fraud issues but the wide array of other serious allegations that had been made. The Task Force's probe was both broader and deeper than any previous investigation of the BLC project.

- The Belmont Task Force completed a highly comprehensive review of this important matter. The Task Force issued 140 grand jury subpoenas, interviewed or obtained statements from 343 witnesses and sources, reviewed more than 1,100 banker's boxes of documents and 8,800 pages of BLC building plans, and consulted outside experts and entities including some of the most ardent critics of the Belmont project.

- The Belmont project has been controversial and has generated considerable public debate in this community. Under these circumstances, it is appropriate that this Office provide its findings and conclusions in a detailed written report made available to the public.

A. Mission and Goals

The District Attorney's Office is charged — in the case of the Belmont Learning Complex as with any other matter alleged to be criminal — with the legal responsibility of determining whether or not crimes have been committed and whether persons or entities should be criminally prosecuted. Once a decision to file criminal charges is made, the prosecution bears the burden of

proving every element of the charged offense and of disproving any affirmative defense(s) raised by the defendant. The standard of proof that must be met by the prosecution is "proof beyond a reasonable doubt."

In arriving at a decision to charge, all available information is reviewed. This information may include investigation reports, written statements of witnesses, and documentary and physical evidence. Where, as in this case, it is necessary and feasible to do so, the Office conducts further investigation of the facts surrounding the alleged wrongdoing.

Previous law enforcement efforts. Prior to the formation of the Belmont Task Force in February 2001, a multi-jurisdictional group had met to evaluate whether crimes were committed related to the development of the BLC site. This group including representatives from the offices of the Los Angeles City Attorney, the Los Angeles County District Attorney, the California Attorney General, and the United States Attorney for the Central District of California. The group met numerous times and representatives from a variety of state and local departments joined in certain of those meetings. On April 14, 2000, the City Attorney concluded in a written statement that "no misdemeanor violations have been proved"with regard to potential environmental crimes at BLC. On April 13, 2000, the District Attorney's Office concluded in writing that "no felony violations [regarding environmental crimes] have been shown." On April 13, 2000, the California Attorney General concluded written findings regarding his specific focus — whether involved state agencies had engaged in any wrongdoing related to the BLC — as follows: The agencies "performed well and faithfully executed their responsibilities under California law." In late 1999, the U.S. Attorney's Office concluded (without a written statement) that there were no chargeable offenses relating to federal environmental laws arising from the BLC project. The U.S. Attorney's Office was the only one of these agencies to make public a conclusion on fraud issues in the BLC project, and that office determined there were no prosecutable fraud offenses.

Notwithstanding these investigations and conclusions regarding the environmental and fraud allegations, public concern deepened and controversy intensified about possible violations of law involving BLC. The continuing controversy, and the more limited scope of the prior inquiries, prompted this Office to organize the Belmont Task Force.

Belmont Task Force. In order to determine whether or not prosecutable offenses occurred during the planning and construction of the Belmont Learning Complex (BLC), the District Attorney's Office assembled a task force which began its work in February of 2001. The Belmont Task Force was charged with broadening the investigation to include not only environmental and

fraud issues, but the wide array of other serious allegations that had been raised in public debate. Accordingly, the Task Force's probe was both broader in scope and deeper in evidence-gathering than any previous investigation of the BLC project (as reflected in the following chapters of this report).

This Belmont Task Force included senior prosecutors, investigators from the District Attorney's Office Bureau of Investigation, representatives of a number of other governmental agencies, and other key participants with helpful expertise. The Belmont Task Force was charged with the responsibility of reviewing all available information, conducting additional independent investigation, and rendering a legal opinion as to whether criminal offenses took place and should be prosecuted.

Belmont Task Force Report. The Belmont project has been controversial and has generated considerable public debate in this community. Under these circumstances, it is appropriate that this Office provide its findings and conclusions in a detailed written report made available to the public.

This report serves two primary purposes. First and foremost, this report addresses whether any crimes have been committed in any aspect of the Belmont Learning Complex project. It has been the primary mission of the Los Angeles District Attorney's Belmont Task Force to review all available evidence, and to conduct further investigation, to determine whether any prosecutable felony criminal violations occurred during the development and construction of BLC.

A second purpose of this report is to assist the public in understanding why the Belmont project has not yet been completed in accordance with original plans and to identify means of improving the LAUSD school construction process. The majority of this report (including Chapters I through IX) is devoted to the BLC project and its troubled process. However, in the final chapter (Chapter X), this report offers an analysis of the larger public policy lessons to be drawn from the failed Belmont Learning Complex project. This analysis is offered to assist LAUSD in improving its school development process so as to avoid similar failures in future projects.

The Belmont Task Force has endeavored to follow all relevant investigative leads, review all applicable documents, consider all possible legal arguments, and otherwise leave no stone unturned in its effort to determine whether any currently prosecutable felony criminal violations occurred during the planning and construction of BLC.

B. Staffing

The work of the Belmont Task Force began in February of 2001, and has been given the highest possible priority in this Office. The Task Force has been staffed by a team of as many as twelve, including veteran prosecutors and senior investigators. This team brought to this project extensive experience with specialized and complex investigations (including environmental and fraud matters) and with the felony jury trial process. The District Attorney, and his executive management staff, have been closely involved throughout the process of this investigation. In particular, Curtis A. Hazell, Director of the Bureau of Specialized Operations, and John M. Zajec, Head Deputy of the Target Crimes Division, provided close review and oversight of the work of the Task Force as it analyzed every possible theory of criminal liability.

C. Sources of Evidence and Information

The Belmont Task Force has made use of a wide variety of sources of information in conducting its investigation. Interviews were conducted or statements obtained from a total of 343 witnesses and participants. These statements were taken by attorneys and investigators of the District Attorney's Office, by investigators from LAUSD's Office of Inspector General, by the state Legislature's Joint Legislative Audit Committee (JLAC), chaired by Assembly Member Scott Wildman, and in some cases by interested parties involved in the deposition process of pending civil lawsuits related to the Belmont project.

Voluminous evidence. The Task Force staff has reviewed more than 1,100 banker's boxes of documents, 8,800 pages of BLC building plans, and voluminous other financial records and documents. Approximately 140 grand jury subpoenas for records have been issued.

Auditors from the Los Angeles County Office of the Auditor Controller, Special Investigations Unit, have assisted this office in the review of the large volume of bank statements, canceled checks, deposit slips, and other financial records the District Attorney's Office obtained.

Consultation with outside experts and entities. The Belmont Task Force has been assisted in numerous tasks by investigators from the LAUSD's Office of the Inspector General. That Office, a special LAUSD investigative agency accountable only to the LAUSD Board of Education, has as its mission the detection and investigation of fraud and corruption within the Los Angeles Unified School District. Inspector General Donald Mullinax conducted both his own investigation and also participated and assisted in the Belmont Task Force investigation. In addition to Inspector General

Mullinax, other IG's Office staff assisting on the project included Denny Kohan, Jim Burns, Janice Eiler, John Kiningham, Michael Walt, Norman I. Wight, and Darwin Wisdom.

As a vital part of this investigation, in March of 2001 the District Attorney's Office retained Geomatrix Consultants, Inc., a geo-technical environmental testing firm, to conduct an independent evaluation of environmental conditions at the project site. Geomatrix conducted its own environmental testing, in addition to reviewing and analyzing prior environmental reports and tests related to the site. Geomatrix findings were compiled in a report entitled *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001).

The District Attorney's Office also consulted extensively with outside agencies and experts familiar with the history and issues surrounding the Belmont project, including environmental experts, real estate appraisal experts, construction experts, and others. These agencies and experts included: the Los Angeles City Fire Department; the California Division of Oil and Gas; the California Department of Toxic Substances Control (DTSC), especially investigators James McCarthy and Tom Donohue; environmental attorney Roger Carrick; Maria Armoudian, legislative deputy to Senator Richard Polanco; environmental consultants Dr. Bernard Endres, Dr. T. Hok Gouw, Charles Lamoureux, and G. Edward Scott; construction experts Wayne Sheridan and Eric Berman; and Hotel Employees and Restaurant Employees International Union AFL-CIO/CLC Senior Research Analyst David R. Koff.

D. Belmont Task Force Report

This report presents the findings and conclusions of the Belmont Task Force regarding potential felony crimes connected with the Belmont Learning Complex project. The report includes a factual summary, an overview of applicable criminal law and prosecutorial policies, and chapters analyzing each of the prosecution theories potentially applicable to these facts. Each of the first nine chapters of analysis includes relevant legal authority, specific factual background relating to the theory, and the legal and factual analysis supporting the conclusion of this Office. The final chapter (Chapter X) identifies larger lessons of public policy which should be drawn from the BLC project.

Chapter II

BELMONT LEARNING COMPLEX: FACTUAL BACKGROUND

Chapter Synopsis

- Downtown Los Angeles has long needed a new high school facility, as demographic changes have caused a population boom in its inner city schools. In the early 1990s LAUSD intensified efforts to select and acquire the land in order to develop such a facility.

- The new high school, Belmont Learning Complex (BLC), was planned to be LAUSD's flagship campus. It was to feature the then-novel "mixed use" concept, including a commercial revenue-generating component and a low-income housing section; a "design-build" construction approach that would speed completion; and finally, generous athletic and recreational facilities to be jointly utilized by the school and the City Department of Recreation and Parks.

- This chapter chronicles the development of BLC, focusing especially on the highlights of what became a complicated, several year effort, and foreshadows the areas of legal controversy that have become associated with the Belmont matter.

A. Land Acquisition and Initial Project Development

Background. The changing demographic and population shifts of the past twenty-five years in this county have created the need for a new public high school to serve the downtown area of Los Angeles. Back in 1923 the old Belmont High School opened its doors to about 500 students. Today, the school serves 5,000. At present, Belmont is the smallest high school in the City of Los Angeles in *land size*, but it has the largest student population. The school draws from the communities of Pico Union, Westlake, MacArthur Park, Temple Beaudry, Angelino Heights, Echo Park, Chinatown, and

downtown. These areas have traditionally been a "first stop" for many immigrants.[1] The neighborhoods are densely populated and school overcrowding has become acute. An additional 2,000 children live within Belmont's boundaries, but must be bused to San Fernando Valley schools.[2]

In response, LAUSD began efforts in the early 1990s to develop plans for and to build a downtown high school. Finding available, affordable land for public school construction in highly developed large urban city centers is especially challenging. High school projects are among the most difficult because their larger physical plant requires the acquisition of more land than lower school grades.

This chapter presents the highlights of what became a complicated, several year effort to develop the Belmont Learning Complex (BLC). These highlights seek to foreshadow the areas of legal controversy that have become associated with the Belmont matter.

Belmont project site. The site that was ultimately selected for BLC is situated about a half-mile down the road going east along 1st Street from the current Belmont High School. The BLC site is L-shaped and its southern border is 1st Street and its eastern border is Beaudry. It is located near the downtown Los Angeles Civic Center, visible from and to the west of the 110 Freeway. (*See* Belmont Learning Complex site maps, below.)

The Belmont site property was purchased in two increments. LAUSD first purchased an **11-acre parcel** north of Colton whose borders are Temple and Beaudry streets. This property was acquired through condemnation in September of 1993 at a price of $28 million, with an estimated additional cost to the District of $2 million for oil well capping. During land acquisition, the interested parties *were aware* that the site was part of the old Los Angeles Oil Field, a shallow and largely depleted oil field extending in an east/west direction from approximately Vermont Avenue to just north of the Los Angeles Civic Center. Significantly, much of the current Belmont High School, where generations of students have attended since 1923, has been located in this same oil field.[3] The 11-acre site had been subjected to extensive environmental testing in the early 1990s.

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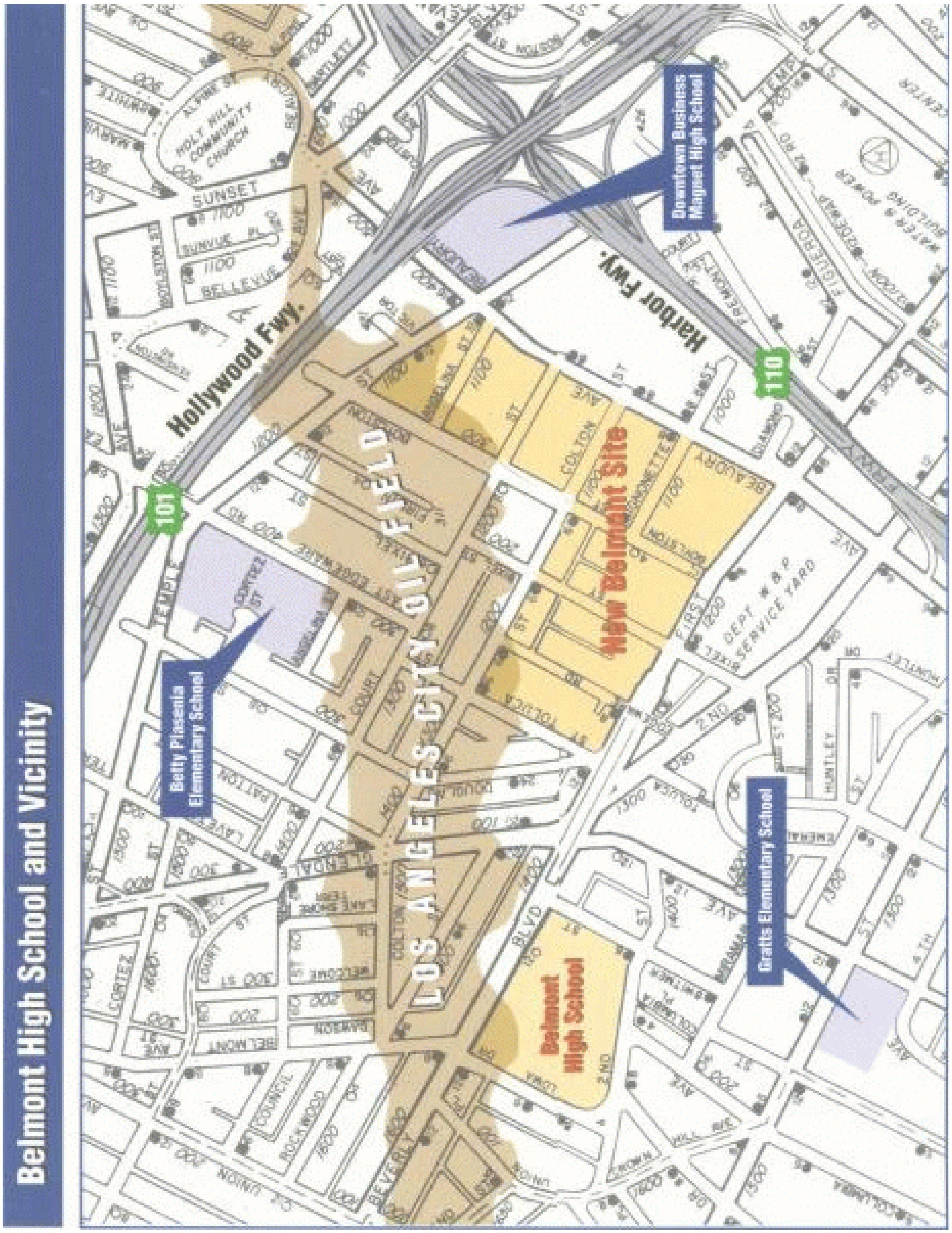
[1] "Belmont High School Today," *www.lausd.k12.ca.us/Belmont_HS/today.html*.

[2] "Build Schools or We All Fail," *Los Angeles Times*, July 9, 2000.

[3] The current Belmont High School (1923) has contained five oil wells and a pumping plant. (*See www.belmont59.com/History.html*.) Also, a photograph exists that was taken in the 1930s showing Belmont High students walking by an oil well situated about ten feet from the administration office. (*See* Los Angeles County District Attorney's Office, Belmont Task Force documentary evidence.)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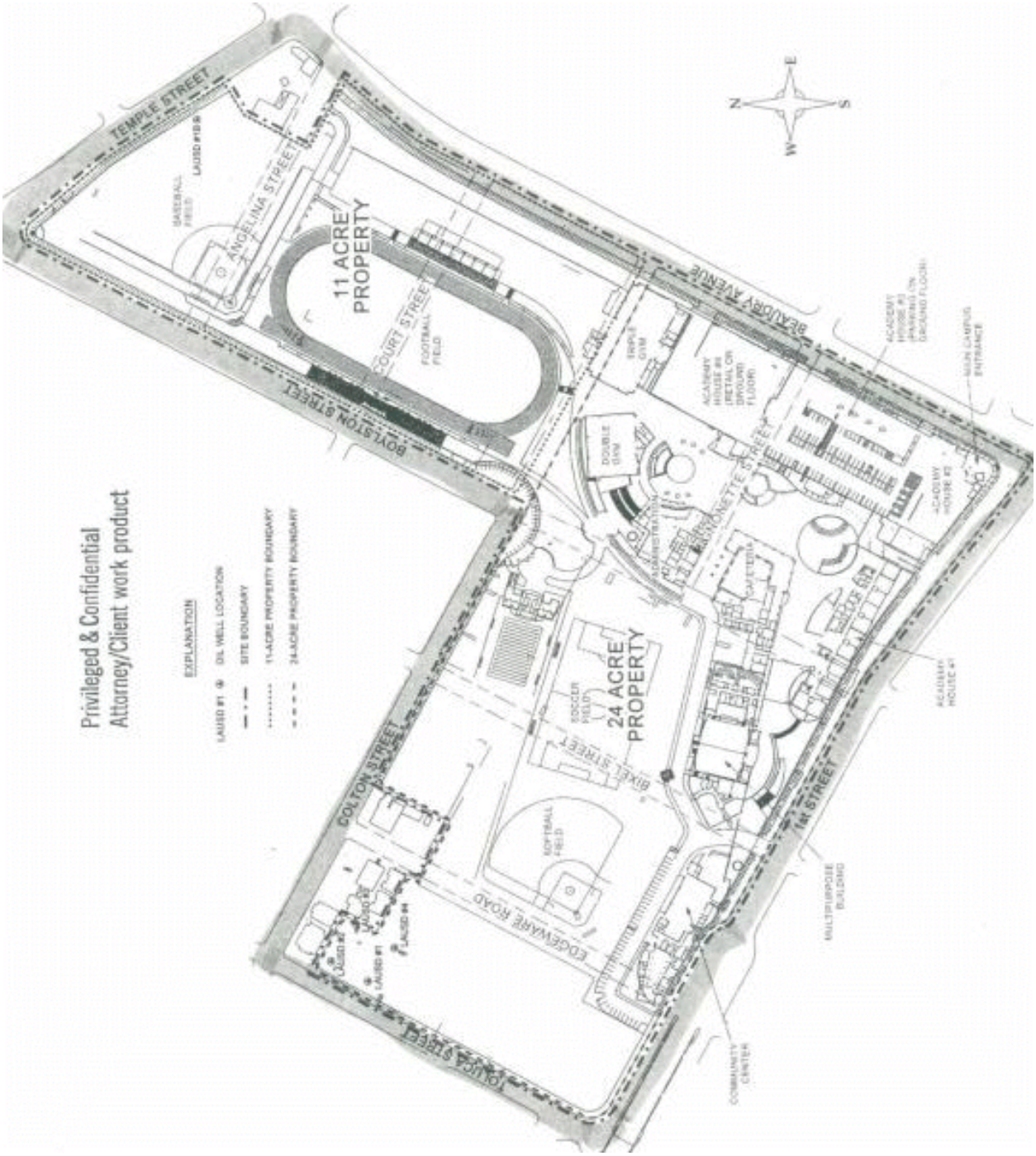
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TEMPLE STREET
BOYLSTON STREET
BEAUDRY AVENUE
COLTON STREET
1st STREET
EDGEWARE ROAD
ANGELINA STREET
COURT STREET
BIXEL STREET
BALDWIN STREET
FOOTBALL FIELD
SOCCER FIELD
SOFTBALL FIELD
BASEBALL FIELD
DOUBLE GYM
ACADEMY HOUSE #1
ACADEMY HOUSE #2
ACADEMY HOUSE #3
ACADEMY HOUSE #4
ACADEMY HOUSE #5
MULTIPURPOSE BUILDING
COMMUNITY CENTER
MAIN CAMPUS ENTRANCE
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LAUSD #1
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The second and larger piece of land that completes the Belmont project site — known as the southern portion — consists of a **24-acre parcel** bordered by 1st and Beaudry streets. LAUSD purchased this portion in 1993 for $30 million. While gas was known to exist on the northern parcel, its presence and significance on the 24-acre parcel *south* of Colton Street, further from the historical Los Angeles Oil Field, was less certain. This larger parcel was purchased from a real estate development company, Shimizu, doing business under the name "S-P Corp." S-P had initially paid approximately $120 million for the land as part of a high-rise commercial development project. Reportedly, S-P sold the 24-acre parcel to LAUSD after a downward turn in the real estate market made its own development project financially unfeasible. Disregarding any potential environmental mitigation costs, two reputable real estate appraisers assessed the value of the 24-acre parcel at $36 million and $38 million, respectively, in the early 1990s.

Key participants. LAUSD's Office of Planning and Development (OPD), a relatively new department, was created in the early 1990s to supplement the District's efforts in handling issues relating to school acquisition, asset development and financing. While it operated under the direct supervision of the LAUSD Superintendent, OPD was not regularly monitored and was outside of the District's traditional fiscal constraints. Dominic Shambra was OPD's first and only Director and was instrumental in the development and implementation of BLC. Dominic Shambra routinely consulted with outside counsel David Cartwright, a partner with the Los Angeles law firm of O'Melveny & Myers who is a real estate expert familiar with public school development issues.

Much later, LAUSD would file a malpractice lawsuit against Cartwright and his law firm alleging conflict of interest. At issue was the propriety of the situation in which Cartwright and his firm represented and advised the District during the same period when LAUSD was selecting BLC's developer. The District chose, *with Cartwright's encouragement,* Temple Beaudry Partners (TBP),[4] a principal partner of which was Japanese construction company Kajima (a longtime client of O'Melveny & Myers). Between 1988–95, O'Melveny & Myers received $14.8 million from LAUSD. During the same time period, O'Melveny & Myers billed Kajima approximately $10.6 million for legal work unrelated to Belmont. At no time did David Cartwright engage in any legal work for Kajima.

David Cartwright contends he disclosed the potential conflict of interest arising from his law firm's simultaneous representation of the LAUSD and Kajima by letter on April 6, 1995 written to

[4] Temple Beaudry Partners, the developer, is referred to by its full name, or as "TBP." When its principal partner, Kajima, is meant specifically, "TBP (Kajima)" is used.

LAUSD's general counsel, Richard Mason, and again on September 12, 1995. We have reviewed documents that show that the LAUSD Board formally waived any potential legal conflict of interest in October of 1995. Regarding LAUSD's malpractice lawsuit, a Los Angeles Superior Court judge dismissed it in January of 2002.[5] LAUSD appealed the dismissal order but while the appeal was pending the parties resolved the matter through settlement in April 2002. Instead of LAUSD pursuing its appeal, and in exchange for its forbearance, the District accepted $3 million from its former attorneys. The LAUSD general counsel stated: "The district and the law firm both decided that the cost and uncertainty of future litigation made this settlement reasonable."[6] Chapter VI outlines these issues in much greater detail.

A "mixed-use" development. The Belmont project design incorporated what is commonly referred to as a "mixed-use" concept. This was to include a high school, a commercial retail area, a shared recreational component, and low-income housing. The high school component was expected to serve up to 5,150 high school students from the Central Los Angeles area and would include four academy buildings (named Academy #1–4). As originally envisioned, the project was to include a retail component. In the proposal finally accepted, retail stores were to be located in what would otherwise have been extra space beneath the academy buildings. The extra space was a by-product of an elevated academy design that created a level campus on an otherwise sloping site. Teachers, community spokespersons, designers, and consultants believed a level campus was necessary to accommodate security and access concerns. The retail area was expected to generate rental income that could be used to offset school operating expenses. Low-income housing was also to be constructed on a portion of the site.

Finally, the plan called for authority over the Belmont athletic and recreational facilities to be shared jointly by the LAUSD and the City of Los Angeles Recreation and Parks Department. Joint authority would require that both agencies share in the construction costs as well as the use of a planned gym, pool, child-care facility, landscaping, and lighting.

The "design-build" approach. The Belmont project was to be developed and built using a "design-build" concept. Under design-build, bidders are given general design specifications. Each bidder then develops its own design solutions to meet the general project requirements. Consequently, designs and bid prices will vary between bidders.

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[5] Statement of Decision, *LAUSD v. David Cartwright et al*., BC216899 (January 24, 2002).

[6] *Los Angeles Times*, April 10, 2002.

The "design-build" method was new to local public school construction. Until the mid-1990s, state law required that a school district award building contracts to the *lowest* responsible bidder. Legislation, AB 481 (Goldsmith),[7] authorizing the use of the "design-build" approach became effective January 1, 1996. Shambra and Cartwright championed the legislation. By way of contrast, under the more traditional "design-bid-build" approach, the school district provides the school design and builders tender bids on the *same* design. LAUSD used a "design-build" approach because theoretically it was a faster and less costly way to complete the school project. The use of this approach, however, led to the selection of the most expensive plan submitted to the LAUSD. Belmont was LAUSD's first experience with design-build school construction, and it later created controversy.

Although the actual Belmont development construction contract was not signed until April of 1997, the selection of TBP, the developer, effectively occurred eighteen months before, in September of 1995, when LAUSD chose TBP for "exclusive negotiations" based on its appealing design-build proposal.

LAUSD's failure to select the least expensive responsible bid submitted led to the filing of a lawsuit in 1997, *Day Higuchi v. LAUSD, et al.*,[8] brought by members of the teachers union and Hotel Employees and Restaurant Employees International Union Local 11. In that case, the court would ultimately rule that the LAUSD's developer selection process was authorized under existing state law.

B. The Selection of Temple Beaudry Partners

Review and selection. In April of 1994, LAUSD circulated a "Request For Qualifications" (RFQ) among developers in the construction industry, requesting that they submit their qualifications. The solicitation produced several bidders whose design proposals would be considered. Cartwright reviewed the legal aspects of the RFQ. Next, LAUSD issued an RFP (Request for Proposal) to those qualified who responded to the RFQ. There were two qualifying phases to the process, during which three finalists were selected: TBP ($99 million bid), CRSS/TELACU ($68 million bid), and Goldrich Kest and Associates ($59 million bid).

[7] Chapter 956, Statutes of 1995.

[8] Los Angeles County Superior Court Case No. BC169554 (filed April 18, 1997).

The LAUSD Board chose TBP's proposal, although it was the most costly bid submitted. However, price did not control the selection process. Given the design-build approach, each proposal was fundamentally different and thus, the proposals could not be compared against one another based on price alone. Also, based on non-price related factors, the TBP proposal was, in OPD Director Dominic Shambra's estimate, the "Cadillac" among the submitted proposals. Finally, so long as sufficient state funds were available to fully pay for the project, the higher price did not necessarily make TBP's proposal prohibitive.

Exclusive negotiations. In September of 1995, LAUSD began "exclusive negotiations" with TBP over the final plan for BLC construction. This had the effect of eliminating the other two bidders from the next step in the development process. The development/construction contract between LAUSD and TBP, called the Disposition and Development Agreement (DDA), was not finalized and approved by the LAUSD Board until April of 1997. The negotiations were originally anticipated to last between sixty and ninety days, but were extended 18 months. During this time there was extensive oversight and public comment. LAUSD could have withdrawn during the negotiation process, and before the final terms of the DDA were agreed to and formally approved. This entire process was debated by the LAUSD Board, by an independent oversight committee of industry experts appointed to make recommendations to the Board, by other interested parties, and by the public.

Board selection of TBP for exclusive negotiations occurred in large part based on the recommendation of the Belmont project's Evaluation Committee. The committee consisted of OPD Director Shambra, David Cartwright and four others, including another O'Melveny attorney, a construction/consultant, and two Kenneth Leventhal accountants. Shambra selected all of the members. Several purported "irregularities" surrounding the selection of TBP's proposal have been alleged.

First, the selection of the proposal submitted by the highest bidder at least appeared to violate state law requiring that construction contracts involving public school projects be awarded to the *lowest* qualified bidder. The truth, however, is that the proposals cannot not be categorized in terms of the "lowest" versus "highest" bidders because of the use of the "design-build" method to solicit proposals. Under this method, each proposal involved a fundamentally different design, and the proposals were not readily comparable.

Second, in assessing the financial aspects of the submitted proposals, a Kenneth Leventhal accountant made a $20 million contingent income stream accounting error. The error favored TBP's proposal.

Third, David Cartwright revised the initial matrix evaluation comments prepared by the other O'Melveny attorney for the submitted proposals. The revisions favored TBP's proposal.

Finally, a 100-point rating error was made in preparation of summary documents after the Selection Committee met and made its choice.[9] This error also favored TBP but apparently would not have changed its resulting selection.

Details surrounding these allegations are further examined in Chapter VI.

Temple Beaudry Partners. Developer TBP consisted of six principals, some of whom are discussed at further length in subsequent chapters.

KAJIMA URBAN DEVELOPMENT: Kajima Urban Development was a subsidiary of Kajima International, a Japanese construction firm that was one of the largest construction companies in the world. Unlike other bidders, Kajima was willing and able to provide construction financing to build the project.

TURNER CONSTRUCTION: Turner Construction was among the largest public works contractors in the United States.

THE RELATED PARTNERS: At the time of the Belmont project, The Related Partners was a business entity that included Dan Neiman, a low-income housing expert. Neiman was also a managing partner with S-P at the time of the purchase of the 24-acre land parcel from S-P for the Belmont project. Because the low-income housing component of the initial Belmont project plan never materialized, Neiman's participation in the construction phase of the Belmont project was minimal.

GATEWAY SCIENCE AND ENGINEERING: Gateway Science and Engineering was a business entity created by Art Gastelum. Gateway Science and Engineering

[9] David Koff publicly aired the computation error during a LAUSD Board meeting prior to the DDA being finalized in 1997.

was represented to be TBP's environmental consultants for the Belmont project. Later, Art Gastelum's role in the Belmont project was to facilitate discussions with the Los Angeles City officials in connection with that aspect of the original Belmont project plan that called for the sharing of costs and use of the project's recreational facilities with the Los Angeles City Department of Parks and Recreation.

LEGASPI & COMPANY: Legaspi & Company was a business run by Jose Legaspi, a real estate broker. Legaspi was to be responsible for leasing the planned retail space that was originally part of the Belmont project plan.

McCLARAND, VASQUEZ & PARTNERS: McClarand, Vasquez & Partners was an architectural firm that included architect Ernesto Vasquez as a partner. Ernesto Vasquez, who developed the concept design given to bidders as part of the LAUSD Request For Proposals, was the designated design architect for the District in the TBP proposal.

During the RFP process, Hotel Employees and Restaurant Employees Union Local 11 sharply criticized TBP and Kajima. Local 11 and Kajima had been involved in a longstanding labor dispute arising out of Kajima's major ownership interest in the New Otani Hotel in downtown Los Angeles. According to OPD Director Shambra, the public criticism and resulting disruption organized by Local 11 prompted Shambra to ask the Board in July 1995 whether it wanted to continue considering TBP and Kajima for the Belmont project. The Board's response was to continue to go forward with TBP and Kajima despite union and other opposition.

The Board's decision to go forward prompted a flurry of renewed criticism from Hotel Employee's Union Local 11. LAUSD, at the insistence of Board member David Tokofsky, established an independent Oversight Committee. This committee, comprised of highly qualified experts, became actively involved in making numerous recommendations and reports to the Board.

Ultimately, during the exclusive negotiations phase of the project, heated opposition to Kajima led to extensive public discussions of all controversial aspects of Kajima, including its relationship with LAUSD's primary outside counsel on BLC, David Cartwright and his law firm, O'Melveny & Myers. This included a discussion of potential conflicts of interest among the principals on both sides. Ultimately, in October of 1995 the Board formally ratified a conflict of interest waiver.

C. Financing and the Development/Construction Contract

Construction financing. The LAUSD and TBP initially expected that Kajima would finance the construction of the Belmont project and that ultimately it would be repaid with funds from the California State Allocations Board (SAB) and funds generated from the sale of bonds. However, as early as 1995, the LAUSD was also considering financing the Belmont project with funds generated from the issuance of Certificates of Participation (COPs), a bond-like security commonly used to finance school construction. This subject, too, would later generate controversy, and is addressed in greater detail in Chapter VII.

Although financially attractive, the COPs also carried a restriction on the use of monies generated from their issuance. Internal Revenue Regulations placed an approximate five percent cap on the amount of COPs-generated funds that could be used on the project serving a "non-governmental purpose," such as a retail business. If the percentage cap were exceeded, the COPs' tax-exempt status would be lost. Consequently, a shift to COPs financing would impact the retail multiple-use aspect of the Belmont development plan as initially envisioned, and alternative non-COPs retail construction financing would have to be obtained if the retail portion were to be built.

Ultimately, LAUSD concluded that COPs would be less costly than Kajima financing. In December of 1997, three months after construction on the Belmont project began, LAUSD issued $91.4 million in COPs. Separate financing was never obtained to continue with the retail component.

Cost and design adjustments. SAB placed a further restriction on use of COPs funds, imposing an approximate $79–85 million cap on the amount that could be spent on the construction of the school in order for SAB to fund those costs of the construction. Both the IRS and the SAB limitations, in conjunction with other unplanned contingencies, led to several design and financial adjustments to BLC.

First, the low-income housing component of the original Belmont design was dropped during the early stages of the development process. This component was dropped amid Oversight Committee criticism that the cost would exceed expected revenues to the school district.

A second design adjustment came because an agreement never materialized between the LAUSD and the City of Los Angeles Department of Recreation and Parks to share the cost and use of certain Belmont athletic and recreation facilities.

Finally, plans were never finalized for the retail component of the original Belmont design. Initially, the additional cost associated with building the retail component was carried as an approximate $6–7 million "upward adjustment contingency" in the construction contract. LAUSD would pay that amount if separate funding could not be secured. Because the retail component was intended to fill vacant space created by the design of the school building, significant construction costs allocated to the retail component would be incurred whether or not the retail was ultimately included in the project. The true construction costs of the area slated to be occupied by retail businesses have been estimated to be between $9–12 million.

Disposition and Development Agreement. On April 30, 1997, the LAUSD Board approved the final version of the Belmont project construction contract, called the Disposition and Development Agreement (DDA). This contract, between LAUSD (owner) and TBP (developer), was a guaranteed maximum price (GMP) contract with a fixed developer fee. The developer was to be paid the actual cost of construction plus a fixed development fee of $3,262,500. There was an $85,875,000 amount placed on the guaranteed maximum price of the project.

In turn, TBP entered into a contract with Turner/Kajima (a joint venture) to act as the project general contractor. The contract between TBP (developer) and Turner/Kajima (general contractor) provided that Turner/Kajima would receive a fee of three percent of the actual construction costs. Turner/Kajima then entered into contracts with various subcontractors using the lowest responsible bidder process. The subcontractor contracts were fixed price contracts and required the posting of performance bonds.

The DDA contained a "bid buy out provision" that allowed savings to be split between the LAUSD and TBP. Theoretically, this provision would create an incentive to keep costs down. In fact, according to one cost of completion study prepared by the independent consulting firm of Hanscomb Inc., if the project had continued to completion, its true cost would have *exceeded* the DDA guaranteed maximum price.

The DDA included only the school component of the original Belmont project design. Significantly, under the agreement, environmental risks were allocated to the LAUSD, including the delay costs associated with remediating environmental problems.

Construction on the Belmont project began in September of 1997, five months after the DDA was signed. The initial construction delay was caused by an injunction issued on May 2, 1997 in response to the lawsuit referenced earlier, *Day Higuchi, et al. v. LAUSD, et al*.[10] Since construction began before the LAUSD obtained financing for the project, initial construction expenses were paid out of the LAUSD operating budget.

D. Methane and Hydrogen Sulfide Gas

Preliminary environmental studies conducted primarily on the 11-acre parcel in the early 1990s confirmed the presence of varying amounts of naturally-occurring methane and hydrogen sulfide soil gases. Methane is a colorless, odorless gas, commonly found in the vicinity of oil fields. Generally, methane concentration levels in a given area will depend on temperature, moisture, and water table conditions. Methane will normally migrate to the surface and escape harmlessly into the air, but if obstructed by structures, the gas can collect and possibly reach explosive levels of concentration. These problems can be mitigated with control systems using barriers and venting through perforated pipes.

While methane was known to exist on the 11-acre parcel, its presence on the 24-acre parcel south of Colton Street, a location more removed from the historical Los Angeles Oil Field, was less certain. In late 1996 an LAUSD Environmental Health and Safety Department representative raised concerns that earlier reports actually indicated methane south of Colton Street. A nationally known environmental testing firm, Law/Crandall, was brought in to resolve that issue. While that soil gas study was ongoing, in January of 1997 a well-known methane mitigation system designer, John Sepich, submitted a preliminary proposal for a system to protect all BLC buildings, generally estimating the cost of such a system to be in the range of approximately $2 million.

Thereafter, the new soil gas study report was received and concluded that methane did not pose a "significant environmental concern" at BLC south of Colton Street, where the majority of the school buildings would be located. In reliance on that report, and after numerous meetings between the methane system designer, TBP, LAUSD, and the Los Angeles City Fire Department, a mitigation system was developed, and a permit for it was issued by the Fire Department, to mitigate the methane *north* of Colton Street. The design and permit cost were approximately $38,000 and the construction and installation costs were estimated to be approximately $107,495.

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[10] *Supra* note 8.

Methane discovered south of Colton. Once school construction began, reports of soil gas were received in November and December of 1997 during excavation activities *south* of Colton Street. Initial efforts to scientifically quantify and verify the presence of soil gas in this area met with varying results. In early 1998, John Sepich was commissioned to conduct comprehensive soil gas survey in an attempt to document the extent of the gas problem.

Sepich's survey revealed the presence of methane gas in the area south of Colton Street. School construction continued with significant modifications to the structures and construction scheduling in order to accommodate a later installation of a methane mitigation system. Buildings were raised without concrete floor slabs so that methane barriers and venting could be installed once the mitigation system was designed and approved. LAUSD proceeded with construction in this manner so as to minimize delay costs which could be substantial and for which it would be liable.

Methane mitigation system designed and ready for installation. During 1998, Sepich designed a methane mitigation system for installation under the impacted school buildings south of Colton Street. This system was subjected to peer review, its approval from the Los Angeles Fire Department was pending, and contracts had been awarded for its installation. The estimated cost for this system was estimated to be in the range of $1.2–1.5 million. Fire Department approval was requested, but it was never given.

In late 1998, the Department of Toxic Substances Control (DTSC) issued a letter stating that the site had not been adequately *tested* for environmental contamination and called for further investigation. In early 1999, LAUSD entered into a voluntary agreement wherein it submitted to the jurisdiction of the DTSC for approval of any environmental remediation and mitigation measures at the site. DTSC has yet to approve any mitigation system. LAUSD indefinitely suspended construction work in November of 1999, and ultimately abandoned the project in January of 2000, pending that approval.

E. Subcontractor Billing and Progress Payments

Under the terms of the DDA, subcontractors at BLC were to receive payment as the work was performed. The payment process involved multiple steps. Initially, each subcontractor was required to submit a payment application to the general contractor, Turner/Kajima, for review and approval. Thereafter, the pay application would be reviewed and approved by the developer, TBP, the architect, McClarand, Vasquez & Partners, the LAUSD project director, and by the LAUSD

Accounts Payable department. The claim, less a ten percent retention amount, was then to be submitted to Los Angeles County for payment.

Despite the multiple levels of approval required before subcontractors were paid for work performed, there were apparent discrepancies between the description of the work billed and the work actually performed. For the most part, these discrepancies were the result of modifications in the scope of work to be performed, cost-reallocations, and line item adjustments in the cost breakdowns. These modifications as well as contract ambiguities allowed subcontractors to bill for a greater portion of the contract's total fixed price earlier in the work process, but did not alter the total amount to be received for the completed job. Even though LAUSD had approved the earlier progress payments, once construction had been stopped, it later would assert that the discrepancies were evidence of false claims and/or the commission of grand theft.

In early 1999, the LAUSD retained a new law firm, Weston, Benshoof, Rochefort, Rubalcava & MacCuish, to advise it on construction and environmental issues. That firm brought in its own construction expert, Wayne Sheridan, to review the project.

Sheridan was originally hired to determine the cost and feasibility of temporarily stopping construction on the project until the methane problem was resolved. The expert arranged for the subcontractors to deliver all materials to the site, presumably to enable the project to restart quickly once the environmental issues were resolved. But the LAUSD decided to stop further construction because of its concerns over the continuing viability of the project due to the environmental problems.

Expert Sheridan began reviewing subcontractor payment applications, and noted line-item discrepancies in the billing. As a result of these discrepancies, the LAUSD claimed it was the victim of subcontractor over billing and false claims (estimated to be approximately $2 million), and ceased further payments to subcontractors on outstanding progress payment bills.

Under BLC's contract, disputes were to be resolved by way of binding arbitration. In June 2001, an arbitrator issued an award against the LAUSD in the sum of approximately $17 million in favor of the developer, architect, and contractors.[11] The award covered payment for work, materials, fees, and costs. In finding against the LAUSD, the arbitrator rejected the LAUSD claim of illegal billing practices and false claims. LAUSD paid the majority of the subcontractors but appealed parts

[11] *Temple Beaudry Partners v. LAUSD*, Case No. 72Y1150041800 (June 7, 2001).

of the decision. The District's appeal was dismissed on August 6, 2002 by the Court of Appeal, and LAUSD has since paid the arbitration award.

F. Project Cessation

Construction on the Belmont project continued until mid-1999 amid increasingly intense public pressure to halt the project because of environmental concerns. In November of 1999 LAUSD suspended indefinitely all construction at BLC, and in January of 2000 LAUSD abandoned the project.

G. Subsequent Developments

On March 12, 2002 the LAUSD Board authorized contract negotiations to begin with Alliance for a Better Community to complete construction of BLC.

On September 24, 2002 the federal Internal Revenue Service concluded that LAUSD had properly used COPs as a method of financing BLC construction. The IRS had issued a preliminary finding letter disallowing the tax-exempt status of the COPs one year earlier.

On December 4, 2002 LAUSD Superintendent Romer announced that seismologists had recently discovered a small but troublesome earthquake fault running beneath two buildings at BLC. Scientists had not been able to determine whether the fault was active or not, but had concluded that the District should assume that it is active. State law prohibits the construction of schools within 50 feet of active faults. On the same day Superintendent Romer announced that LAUSD would halt negotiations and planning for BLC's construction, in its *current configuration*, because of seismic concerns.[12] The Superintendent outlined several possible alternatives, including construction of a viable high school on the property using a reconfigured arrangement of school buildings.

[12] LAUSD News Release dated December 4, 2002.

Chapter III

RELEVANT LEGAL PRINCIPLES AND CRIMINAL STATUTES

Chapter Synopsis

- The District Attorney's Office has jurisdiction to prosecute all felonies in Los Angeles County and misdemeanors in all unincorporated areas of the county. The Los Angeles City Attorney's Office prosecutes misdemeanors occurring within the City of Los Angeles, and the BLC site is located downtown in the city. However, a BLC-related misdemeanor which is joined with felony charges in a single matter could be prosecuted by the District Attorney.

- The standard of proof in a criminal case is "proof beyond a reasonable doubt." The criminal process mandates the right to a jury trial and a unanimous verdict. District Attorney filing standards require that the available facts must satisfy the prosecutor that the accused is actually guilty, that there is legally sufficient and admissible evidence of the crime and its perpetrator, and that the evidence would warrant conviction by the fact finder after hearing plausible defenses.

- The District Attorney has considered seventeen criminal and civil statutes in its evaluation of whether wrongful conduct occurred concerning the development and construction of BLC.

A. Criminal Law Overview

Established legal principles, deriving from California law and standards of prosecutorial discretion, have guided the District Attorney's Office investigation into possible criminal wrongdoing in the development and construction of the Belmont Learning Complex (BLC).

A violation of a statutory duty is not otherwise a crime *unless a criminal sanction or punishment attaches to that violation of duty*.[13] Accordingly, this Office has focused its inquiry in this matter on those California statutes which impose criminal sanctions.

Concerning the criminal laws potentially applicable in the Belmont matter, by way of background, any possible criminal activity associated with the planning and construction of BLC would have occurred within the City of Los Angeles where the project is located and all relevant events occurred. The Los Angeles County District Attorney prosecutes *felony* violations occurring in the City of Los Angeles. The Los Angeles City Attorney normally prosecutes *misdemeanor* charges arising within the City of Los Angeles. However, misdemeanor charges that are joined with felony charges in a single case are prosecuted by the District Attorney.

A crime is a "felony" if its commission is punishable in state prison.[14] Alternate felony-misdemeanor crimes (wobblers) include state prison as a possible punishment. Wobblers may be handled by the Los Angeles District Attorney's Office as felony prosecutions, or they may be referred to the Los Angeles City Attorney's Office for misdemeanor prosecution.

Standard of proof in a criminal case. The proof required to prosecute a criminal case is different than the proof required for a civil case or the proof necessary to maintain an administrative action. In a criminal case, the prosecutor must prove every element of the charged offense and disprove every raised affirmative defense to the standard of proof of "beyond a reasonable doubt." A criminal defendant has a constitutional right to a trial by jury. A unanimous verdict among all twelve jurors is required for a conviction. A criminal defendant is "presumed" innocent.[15] If there

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[13] Penal Code section 15 provides: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death;
2. Imprisonment;
3. Fine;
4. Removal from office; or,
5. Disqualification to hold and enjoy any office of honor, trust, or profit in this State."

[14] Penal Code section 17(a) provides: "A felony is a crime which is punishable with death or by imprisonment in the state prison …."

[15] CALJIC No. 2.90 (6th ed. 1996) "Presumption of Innocence–Reasonable Doubt–Burden of Proof" provides:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty

are two reasonable interpretations of circumstantial evidence, one interpretation consistent with guilt and one consistent with innocence, the fact finder must adopt the interpretation that is consistent with innocence.[16]

B. District Attorney Filing Standards

The standards for case filing by the Los Angeles County District Attorney's Office are set forth in its Legal Policies Manual at 1-1. Generally, those standards require that:

- The available facts must satisfy the prosecutor that the accused is actually guilty;
- There must be legally sufficient admissible proof apart from the accused's statements to establish that the crime occurred;

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beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

[16] CALJIC No. 2.01 (6th ed. 1996) "Sufficiency of Circumstantial Evidence – Generally" provides:

> "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

- There must be legally sufficient admissible proof of the accused's identity as the perpetrator; and

- A reasonable and objective fact finder would convict after considering the admissible evidence and the foreseeable defenses.

C. Possible Statutory Violations

The District Attorney's Office has considered possible felony violations of the following statutes:

- Penal Code section 67, bribery;

- Government Code section 1090, conflicts of interest in public contracts;

- Penal Code section 487, grand theft by false pretenses;

- Health and Safety Code section 25189.5, the Hazardous Waste Control Law;

- Penal Code section 374.8, felony littering;

- Penal Code section 387, corporate criminal liability;

- Penal Code section 664/273a, attempted child endangering;

- Corporations Code section 25401, material misrepresentations in issuance of securities;

- Penal Code section 72, false claims; and

- Penal Code section 182, conspiracy.

In addition, the Belmont Task Force has considered the possible application of various misdemeanor statutes including:

- Government Code section 54952.7, the Brown Act;

- Government Code section 81000 *et seq.*, the Political Reform Act;

- Health and Safety Code section 25221, requiring notification by property owners of significant disposal of hazardous waste; and

- Health and Safety Code section 25242, requiring notification by government agencies of significant disposal of hazardous waste.

Finally, the District Attorney's Office has considered the application of various statutes that set forth a duty but provide no criminal penalty for failure to comply, including:

- Education Code section 17213, the School Facilities Act;

- Public Resources Code section 21151.8, California Environmental Quality Act; and

- Health and Safety Code section 25359.4, the Hazardous Substance Account Act.

This Office has examined a variety of possible prosecution case theories arising from the facts and circumstances surrounding BLC. In analyzing each potential prosecution theory, the previously discussed District Attorney filing standards were applied.

The following chapters examine in detail the above possible prosecution theories involving LAUSD personnel, LAUSD consultants and advisors, Kajima personnel, TBP personnel, Belmont contractors, subcontractors, and others.

Chapter IV

ENVIRONMENTAL ISSUES

Chapter Synopsis

- Fundamental to the Belmont inquiry is whether the BLC site contains any "hazardous waste" within the special legal meaning of California's Hazardous Waste Control Law. The naturally-occurring soil gases and oil-impacted soils — present here as a result of an old oil field — raise legitimate concerns but do not qualify as "hazardous waste" under California law and will not support prosecution under these laws.

- As the full extent of the naturally-occurring soil gas and crude oil presence on the site became known during construction, the project participants retained recognized experts and consulted with appropriate regulatory authorities to develop mitigation systems designed to meet the environmental concerns posed by those conditions.

- This Office has carefully investigated the specific allegation that there was a "cover-up" of the extent of soil gas contamination at BLC in order to hurry the school's construction before the project could be delayed by such concerns. But judged by legal and industry norms for remediation at such sites, LAUSD, Temple Beaudry Partners, and Turner/Kajima acted in a reasonable manner in attempting to address the soil gas problems as they were discovered. Their conduct will not support prosecution under the applicable legal standards.

A. Introduction

The Belmont Learning Complex (BLC) controversy has first and foremost concerned the issue of whether the soil on which the complex was built was contaminated by hazardous waste and thus was inherently dangerous, rendering the site unsuitable for school construction. Because this environmental issue emerged first and is central to this controversy, we address this important issue first in this report.

Environmental concerns potentially affecting children rightly command the highest priority in our community. This Office has given the closest possible scrutiny to the environmental issues presented by the BLC project, as those issues involve questions of the health and safety of school children who would use the complex.

In conducting this close analysis, this Office has adhered to the ethical requirement that prosecutors proceed objectively, with the final determination on possible prosecution based solely on the facts of the case and the requirements of the law. In this process of review, this Office has considered the views of every interested person and group; every possible legal theory — however plausible — has been considered and evaluated.

Reflecting this high level of scrutiny, this chapter presents a detailed review of the enormous amount of information, evidence, scientific findings, and statutory law available and relevant to whether environmental crimes were committed at the Belmont site.

Issues addressed. Our review of these issues includes analysis of the numerous issues raised by previous commentators on the Belmont controversy. The LAUSD Inspector General's first comprehensive review of possible environmental violations and other wrongdoing arising in connection with BLC was released in September of 1999, and is referenced hereafter as *IG Report I*.[17] This first report was followed by the more specific *IG Referral Letter*[18] sent to this Office. Those documents, as well as critiques from local advocacy groups and individuals, have made a number of environmental allegations against those responsible for the BLC project. The central thrust of those allegations was that the Belmont site was irreparably contaminated and the BLC participants violated environmental laws in addressing, or failing to address, such issues.

In particular, critics of the BLC project have alleged that the Belmont land was purchased and construction commenced without an adequate environmental investigation, with the result that BLC was built on a site that is inherently unsafe for a school. It has been further alleged that the methane and hydrogen sulfide soil gas conditions were known prior to construction, but were concealed from authorities in an effort to hurriedly commence construction before the project could

[17] LAUSD Internal Audit and Special Investigations Unit, *Report of Findings Belmont Learning Complex,* dated September 13, 1999 (hereafter *IG Report I*).

[18] Letter to John Paul Bernardi, L.A. County District Attorney's Office, Environmental Crimes/OSHA Division, from Roger Lane Carrick, Special Counsel to the LAUSD Office of Internal Audit and Special Investigation, dated September 20, 1999 (hereafter *IG Referral Letter*).

be delayed or stopped. These allegations suggest that contaminated soils and hazardous waste were improperly transported, stored, and disposed of during the grading and excavation process, and that underground storage tanks and oil wells were improperly abandoned. Finally, questions have arisen about whether an environmental contract was improperly awarded in violation of conflict of interest statutes. These issues and all possible statutory violations are addressed as separate topics in the following analysis.

Conclusion in brief. After a comprehensive review of all relevant allegations concerning hazardous waste, contamination, and related issues, it is the conclusion of this Office that there is inadequate evidence to support prosecution of any BLC project participant for any violations of California environmental law.

B. The Hazardous Waste Control Law

Much of California environmental law revolves around whether a substance is considered "hazardous waste." Thus, from the outset we understood that scientific testing of BLC soil and other objects on the site for hazardous waste would be central to uncovering the truth. To assist in that scientific determination, the District Attorney's Office retained a nationally-recognized environmental consulting group, Geomatrix Consultants, Inc., to provide an independent technical review of the conditions at the site. Geomatrix's comprehensive study assessed existing conditions by collecting additional soil and soil gas samples. The company also determined whether previously collected environmental data were suitable for current consideration.

Geomatrix completed eighteen soil borings and collected more than 60 soil samples that were subjected to testing for the presence of hazardous substances. It collected 176 soil vapor samples at 100-foot intervals from throughout BLC which were tested for methane and hydrogen sulfide gases. Geomatrix analyzed similar previously-completed soil vapor sample tests and other information collected at the site. Included in its examination were the conclusions of a substantial number of significant, detailed reports completed earlier.[19] Concurring with several other highly

[19] McLaren Environmental Engineering reports from 1988 and 1989, a 1990 ABB Environmental Services Phase I assessment of the 11-acre portion of the site, a November 1990 Phase II ABB site assessment, a March 1994 ENV America, Inc. site examination, an October 1996 Law/Crandall Report, a 1997 Remedial Management Corporation report, a March 1997 Law/Crandall report, a May 1997 Law/Crandall revision, an El Capitan Environmental Services report, a January 1998 Environmental Support Technologies report, and an Environmental Strategies Corporation report of June 1999, among others. *See* Geomatrix Consultants, Inc., *Evaluation of Existing Environmental Conditions Belmont Learning Complex* (August 2001) at Part 4.0 and Appendix A.

qualified environmental consultants, Geomatrix concluded that the BLC site is free of any hazardous waste as defined by California law.

Since the question of the presence of hazardous waste at the site is central to the BLC controversy, this issue is addressed in detail. The primary criminal statute governing the handling of environmentally dangerous waste materials in California is the Hazardous Waste Control Law (HWCL), Health and Safety Code section 25100 *et seq*. That statutory scheme regulates the disposal, transportation, and storage of "hazardous waste" in this state. If a substance is "hazardous waste" within the meaning of this law, this finding triggers the requirement of compliance with numerous legal standards for dealing with such waste. These standards also govern whether provable crimes were committed during the development of the Belmont project.

The term "hazardous waste" carries a specific legal meaning under the HWCL. Although certain materials may appear to be inherently dangerous, they may not fall under the statutory and regulatory definition of "hazardous waste" and are thus not subject to the HWCL.

Prohibited activities. To establish a violation of the HWCL, pursuant to Health and Safety Code section 25189.5, the evidence must demonstrate:

> 1. A person *knowingly* or reasonably *should have known* that he or she was *disposing of (or transporting)*, or *causing the disposal (or transportation)* of a hazardous waste to or at any point or a facility that did not have a permit from the Department of Toxic Substances Control to receive hazardous waste (subdivisions (b) or (c));
>
> 2. Or, in the case of treating or storing hazardous waste, a person *knowingly treated or stored hazardous waste* at a facility or at any point, that *did not have a permit* from the Department of Toxic Substances Control for such treatment or storage (subdivision (d)); and
>
> 3. A hazardous waste was *disposed of, transported, treated or stored* at a facility or at any point that *did not have such a permit*. (Emphasis added.)

Penalties. Penalties for violation of section 25189.5 include imprisonment in the state prison for 16, 24 or 36 months, and a maximum fine of $100,000 for each day of violation. Such criminal

sanctions apply to any persons engaged in any of the specified acts regarding hazardous waste, including disposal, transporting, treating, or storing such waste without a permit.

In addition, more stringent penalties are provided in Health and Safety Code section 25189.6 which provides that any person who *knowingly, or with reckless disregard for the risk*, treats, handles, transports, disposes or stores any hazardous waste in a manner which *causes any unreasonable risk of fire, explosion, serious injury, or death.* Such person is guilty of a felony and is punishable by a fine of up to $250,000 for each day of violation, and imprisonment of 16, 24, or 36 months. Subdivision (b) of section 25189.6 provides that any person who knowingly, at the time the person takes the actions specified in subdivision (a), places another person in imminent danger of death or serious bodily injury, is punishable by a fine of up to $250,000 for each day of violation, and imprisonment for 3, 6, or 9 years.

Other relevant definitions of hazardous waste. The term "waste" is defined in Health and Safety Code section 25124(a): waste is any solid, liquid, semisolid, or *contained gaseous discarded material* that is not excluded by the HWCL or by regulations adopted pursuant to that law.

"Discarded material" is defined in Health and Safety Code section 25124 as any material that is relinquished by being disposed of, burned or incinerated, accumulated, stored, or treated, but not recycled, before, or in lieu of, being relinquished by being disposed of, burned, or incinerated, or considered inherently waste-like, as specified in regulations adopted by the Department of Toxic Substances Control (DTSC).

Health and Safety Code section 25110.11 provides an exemption that is central to our analysis of criminal environmental liability. This provision defines "contained gaseous material" for purposes of Health and Safety Code 25124(a), or any other provision of the HWCL, as any gas that is *"contained in an enclosed cylinder or other enclosed container*." (In this regard, it is clear that the state Legislature realized that for the HWCL to be workable, a practical exemption had to be made for cases such as the automobile, because an internal-combustion powered vehicle routinely expels various hazardous non-containerized gases.)

This statutory definition resolves a key issue in this investigation: The naturally-occurring methane and hydrogen sulfide gases found at BLC are not containerized, and thus, under the provisions of Health and Safety Code section 25110.11, these gases are not "waste" subject to the requirements of the HWCL.

The term "hazardous waste" is also defined in Health and Safety Code section 25117. The section provides that a hazardous waste is a waste that meets the criteria for "hazardous waste" as adopted by the Department of Toxic Substances Control (DTSC), pursuant to Health and Safety Code section 25141. That section provides that the DTSC shall by regulation develop and adopt criteria and guidelines for the identification of hazardous waste.

DTSC has enunciated four general characteristics that define a waste as "hazardous."[20] Those general characteristics are (1) ignitability; (2) corrosivity; (3) reactivity; and (4) toxicity. Certain concentrations and other restrictions further define wastes within those four general criteria.

DTSC has also promulgated a list of approximately 791 wastes that are presumed to be hazardous.[21] *Significantly, neither crude oil nor petroleum are listed as presumptively hazardous*. Methane is not listed, but in certain concentrations methane is ignitable, and therefore comes within the ignitability definition of a hazardous waste. Hydrogen sulfide is listed as being presumptively hazardous because it is both toxic and ignitable.

Naturally-occurring crude oil is not a "hazardous waste" within the HWCL because it is not specified as "hazardous" under the statutes or regulations. Although methane and hydrogen sulfide are in theory hazardous types of substances under the HWCL, so long as those gases are in a *non-containerized* form, they are not "waste" and are therefore not "hazardous waste" subject to HWCL.

Other relevant terms that may have an impact on determinations of whether a substance is hazardous waste include "hazardous waste facility," "storage," and "treatment." Health and Safety Code section 25117.1 defines "hazardous waste facility" as being any contiguous land and structures, other appurtenances, and improvements on the land used for the treatment, transfer, storage, resource recovery, disposal, or recycling of hazardous waste. That section further provides that a hazardous waste facility may consist of one or more treatment, transfer, storage, resource recovery, disposal, or recycling hazardous waste management units, or combination of those units. Health and Safety Code section 25123 defines "storage" as the holding of hazardous wastes, for a temporary period. Health and Safety Code section 25123.5 defines "treatment" as any method, technique, or process which is designed to change the physical, chemical, or biological character or

[20] *See* Title 22 of the California Code of Regulations.

[21] *See* Title 22 California Code of Regulations section 66261.126, Appendix X.

composition of any hazardous waste or any material contained therein, or which removes or reduces its harmful properties or characteristics for any purpose.

Summary. The provisions of the Hazardous Waste Control Law govern only those materials which meet the statutory definition of "hazardous waste." Naturally-occurring crude oil and non-containerized methane or hydrogen sulfide gases, such as are commonly found in or near oil fields, are not hazardous waste under the HWCL's statutory definitions and other relevant definitions found in the Health and Safety Code and reviewed above. The methane and hydrogen sulfide gases found at BLC are not hazardous waste because they are gases that are not in cylinders or other containers, and are therefore exempted, as noted, under Health and Safety Code section 25110.11.

C. Methane and Hydrogen Sulfide

This section reviews the background and history of methane and hydrogen sulfide gases at the BLC site.

Background. Preliminary environmental studies conducted primarily on the **11-acre parcel** *north* of Colton Street in the early 1990s confirmed the presence of varying amounts of naturally-occurring methane and hydrogen sulfide soil gas at BLC. While the gas was known to exist on that parcel, its presence and significance on the **24-acre parcel** *south* of Colton Street, further from the historical Los Angeles Oil Field, was less certain. After construction commenced, more comprehensive testing on the 24 acres established the presence of methane and hydrogen sulfide soil gas. These concerns would eventually cause the LAUSD to modify its construction to accommodate mitigation plans, then later to cease construction, and ultimately to abandon the project.

Theories of alleged methane concealment. It has been claimed that the existence of the methane and hydrogen sulfide soil gas on the 24-acre site south of Colton Street was known or should have been known to the LAUSD and other responsible parties before construction began, given the history of the site, the prior environmental reports, and the migration tendencies of methane soil gas. It is argued that the presence of methane and hydrogen sulfide gas was intentionally concealed or understated and had the soil gas problem been known, public concern over the environmental danger to school children, and/or Board reluctance to bear the financial burden of mitigation would have prevented the project from going forward.

Commentators have suggested that financial improprieties occurred related to the sums initially budgeted for potential environmental clean-up such as methane mitigation. During LAUSD's exclusive negotiations with TBP and in an effort to fit the project within the State Allocations Board maximum allowable price limit, the District sought to cut costs and reduce the scope of the original TBP design proposal. As part of that negotiation process, TBP successfully bargained away financial responsibility for all site environmental clean-up work, a responsibility that had been part of its obligations under the terms of the original RFP/RFQ. Since it was no longer responsible for any environmental clean-up costs, TBP removed a $2 million "Hazmat" cleanup allowance budget item from its preliminary school cost budget estimate resulting in an apparent reduction in price. At the same time, TBP sought other developer fees and forms of compensation with such costs appearing in other parts of the Belmont "mixed use" project such as the Joint Powers Authority.

In short, TBP negotiated more compensation for less work, while the LAUSD shouldered additional financial responsibility for environmental clean-up of unknown scope. Coincidentally, John Sepich, a well-known methane barrier designer, had estimated the cost of a mitigation system that would protect *all* the structures against potential soil gas conditions to be in the range of $2 million. Rather than incorporating such a $2 million system into the project plans and budget, work began *south* of Colton Street under a general strategy of mitigating for soil gas if necessary. The argument is that those responsible for the project should have accurately identified up-front the full extent of the environmental problems including methane soil gas and devised a specific response prior to the start of any construction. Instead, it has been theorized that sums initially budgeted for environmental clean-up were appropriated to fund additional fees to TBP.

Finally, it has been asserted that once the presence of gas *south* of Colton Street was verified by more comprehensive testing, the Fire Department was not notified. Instead, the Belmont buildings were hurriedly raised before a potentially time consuming controversy over the appropriate mitigation system could possibly delay or derail the project.

Potentially applicable statutes. The District Attorney's Office has investigated these theories to determine whether prosecutable felony criminal conduct has occurred, under the following statutes:

- Health and Safety Code section 25189.5 (Hazardous Waste Control Law);

- Penal Code section 387 (Corporate Criminal Liability Law);

- Penal Code section 374.8 (felony littering);
- Penal Code section 487 (grand theft);
- Penal Code section 664/273a (attempted child endangering); and
- Penal Code section 182 (conspiracy).

Conclusion in brief. The District Attorney's Office has concluded that there is insufficient evidence to establish that any of the above crimes were committed. We base this conclusion on a number of factors.

Prior to construction, LAUSD retained a nationally-recognized environmental testing firm, Law/Crandall, to resolve the question of soil gas under the proposed structures *south* of Colton Street. While in hindsight it is clear the firm erroneously concluded that methane and hydrogen sulfide did *not* pose a problem, there is no evidence to support claims that the parties were *unjustified* at that time and under the circumstances in relying upon the conclusion of a qualified expert, or that a "mitigate-as-needed" approach to soil gas problems was unreasonable. After construction commenced, and once the presence of methane and hydrogen sulfide soil gases south of Colton was actually verified, appropriate and timely actions were taken to mitigate those conditions.

The evidence is altogether insufficient to establish the existence of a "cover-up" of the methane south of Colton. Importantly, the Fire Department participated in every stage of the process. Ultimately, the failure to install a mitigation system was the result of delays inherent in completing testing, agreeing on the appropriate design, hiring contractors, and most significantly here, finding governmental agencies willing to approve the mitigation system. As the facts clearly demonstrate, delay was *not* the result of any effort to conceal the methane and hydrogen sulfide gas condition.

Early methane concerns. In November of 1996, a Final Environmental Impact Report (EIR) was submitted to the Board for approval. The EIR analyzed the environmental consequences associated with building BLC. As part of that analysis, the EIR identified a variety of potential environmental hazards at the Belmont site, including possible methane gas seepage. The EIR also proposed a strategy of mitigating those possible environmental problems, if and when they arose during construction.

On November 18, 1996, the Board considered the EIR for approval. Comments to the Board during the session underscored the uncertainty in predicting the scope of the potential environmental problems and the methods for mitigating them. The Board approved the EIR.

On November 25, 1996, Richard Lui of the LAUSD Environmental Health and Safety Office sent an e-mail to Ray Rodriguez of the LAUSD Office of Planning and Development (OPD). Lui stated:

> …I reviewed the methane survey for the 24 acres portion and it looks like methane is present in the area where the buildings are located. According to Ken Reizes, methane detection and ventilation has not been considered for the buildings. It looks like it may be required. Let's discuss when you return.

On December 3, 1996, Richard Lui responded to a previous e-mail from Ray Rodriguez. The Richard Lui e-mail contains an undated copy of the previous Ray Rodriguez e-mail. The undated Rodriguez e-mail provides:

> Richard, yes we need to talk now about any methane vent system that needs to be designed….This is the first that I've heard that the building footprint was in a gas area…this could have a MAJOR impact on the program. (Emphasis in original.)

Richard Lui's December 3, 1996, e-mail states:

> Regarding the presence of methane, please see the ENV America report (i.e., Figures 3 thru 5 and Tables 4 & 5). I recommend that your designers consult the City of Los Angeles Department of Building and Safety to ensure their requirements are being followed per the EIR.
>
> I have referred Methane Specialists to Ken Reizes as a possible engineering firm to assist in methane control design. They have previously done work for the District and have extensive experience in the Fairfax area.

Law/Crandall retained to resolve methane question. On December 30, 1996, Temple Beaudry Partners (TBP) requested LAUSD's authorization for Law/Crandall to perform new geo-

technical and environmental testing south of Colton Street.[22] Areas to be tested included the land under the proposed Administration Building, Media Center, Multipurpose Building and Cafeteria, Aquatic Center, double gym and basketball courts. Law/Crandall was to examine subsurface soil conditions under prospective structures and also determine if organic vapors were present. On January 7, 1997, the LAUSD gave approval for Law/Crandall to begin work.[23]

On January 14, 1997, LAUSD also instructed Law/Crandall to comprehensively examine and analyze previous environmental records, reports and studies of the BLC.[24] Pursuant to the agreement, Law/Crandall examined the following documents:

- Report of Phase I Site Assessment, including Phase II Workplan of Belmont Junior High No. 1, dated May 22, 1990 prepared by ABB Environmental Services, Inc.;
- Property Transaction Environmental Assessment Report (Phase I) dated November 2, 1988, prepared by McLaren Environmental;
- Subsurface Soil Investigation Report (Phase II), dated March 9, 1989, prepared by McLaren Environmental;
- Division of Oil and Gas Records;
- Division of Oil and Gas Abandonment Procedures;
- Phase II Site Investigation Report, November 1990, prepared by ABB Environmental, Inc.; and
- Report of Subsurface Investigation, Pacific Rim Plaza, Los Angeles, CA, March 1994, prepared by ENV America, Inc.[25]

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[22] Ken Reizes, Temple Beaudry Partners letter to Dominic Shambra, LAUSD (December 30, 1996).

[23] Memorandum from Dominic Shambra to Ken Reizes, Temple Beaudry Partners (January 6, 1997).

[24] Law/Crandall proposal for environmental consulting services, signed by Dominic Shambra, LAUSD (January 14, 1997).

[25] This was the report referred to by Richard Lui in his November 25, 1996 e-mail to Ray Rodriguez.

Preliminary cost estimate for comprehensive methane barrier. In late 1996, TBP contacted the well-established methane consultant John Sepich and his firm, Methane Specialists, and asked them to prepare a general proposal for the design and construction of a methane barrier.[26] On January 5, 1997, Sepich submitted an estimate to TBP which proposed placing a methane barrier under all of the proposed buildings at BLC. The cost was estimated to be "in the two million dollar range" and was very general and based on a "preliminary estimate." Sepich further noted that the price could be substantially reduced if an electronic gas detection system proved unnecessary.[27] The proposal recommended that planning meetings be set as soon as possible between the LAUSD, TBP, Los Angeles Department of Building and Safety, the Los Angeles Fire Department, and the project methane engineer to solidify the design requirements.

Contract negotiations. During this general time frame, the "design" aspect of the "design-build" process used for BLC was in progress. The LAUSD and TBP had been engaged in "exclusive negotiations" on-going since September 1995 to arrive at an acceptable development/construction contract. As part of those negotiations, costs were being examined and responsibilities for various aspects of the work were being resolved. On November 22, 1996, Ken Reizes, the project executive for TBP, provided a budget estimate update to Dominic Shambra of the LAUSD.[28] This November 1996 budget estimate emphasized reducing the Guaranteed Maximum Price (GMP) to accommodate the LAUSD by shifting cost estimates between various aspects of the entire project. The proposed overall budget estimate added fees and other compensation for TBP. It also eliminated a $2 million dollar clean-up allowance contained within the GMP that had been part of the previous June 1996 budget estimate.

Later, on February 5, 1997, Ken Reizes memorialized various on-going budget and contract negotiations in a letter to Dominic Shambra.[29] Reizes reported that the costs for design and construction of a methane control system would be excluded by TBP and would therefore be the responsibility of the LAUSD. This meant that a methane control system would *not* be included within the scope of work subject to the GMP, and any work performed by TBP would be a basis for

[26] Los Angeles District Attorney's Office interview of John Sepich (May 31, 2001).

[27] Sepich proposal to Kajima International (January 5, 1997).

[28] Temple Beaudry Partners, by Kenneth J. Reizes, Project Executive for Kajima International letter to Mr. Dominic Shambra (November 22, 1996).

[29] Kenneth J. Reizes, Project Executive for Kajima International, Inc., letter to Mr. Dominic Shambra (February 5, 1997).

a change order outside of the GMP. In short, any methane mitigation would be an "extra" for which the LAUSD owner would have to pay. These, and other aspects of the development/construction agreement, were reviewed by LAUSD's Oversight Committee (outside consultants), subjected to public comment, and eventually accepted by the LAUSD Board when it approved the Disposition and Development Agreement (DDA) on April 30, 1997.

Although the cost of environmental mitigation would be paid by the LAUSD, TBP continued to coordinate resolution of any methane and hydrogen sulfide gas issues. Shortly after receiving John Sepich's initial proposal, a meeting was held at the Los Angeles Fire Department on January 21, 1997. Present were representatives from Temple Beaudry Partners (developer), Law/Crandall (environmental consultant), Turner/Kajima (general contractor), McClarand, Vasquez & Partners (architect), and possibly the LAUSD (owner).[30] Fire Department assistance in reviewing and approving a methane mitigation plan was requested.[31] The Fire Department was informed that the LAUSD Board had expressed concerns about the possible presence of methane at the site, especially because the site was an old oil field.

Methane Seepage Zone regulations. Los Angeles Fire Department Inspector Joe Gould advised that the site was *outside* the designated "Methane Seepage Zone" (located in the Fairfax area near the LaBrea tar pits) and that the Fire Department did not have jurisdiction over school construction. Nevertheless, Inspector Gould agreed to assist because there appeared to be no other agency willing to review the methane issues. Significantly, the owner and developer were willing to make BLC subject to the "Methane Seepage Zone" regulations, even though the project was not within the methane control zone and *not* governed by the regulations.[32] Inspector Gould agreed to

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[30] Los Angeles Fire Department File: Belmont Complex, Inspector Gould's meeting notes (January 21, 1997). *See also* Los Angeles District Attorney's Office interview of Los Angeles Fire Inspector Joe Gould (April 5, 2002). Present at the Los Angeles Fire Department were Ken Reizes from Kajima; James Allison from Turner Construction, Steve Gaffney and Michael Gould from MV&P; and James Van Beveren from Law/ Crandell. The Fire Department File contains a business card of Raymond Rodriguez from the LAUSD, but Ray Rodriguez' presence at the meeting is not reflected in Inspector Gould's notes.

[31] School construction issues including plan review and permitting are under the jurisdiction of the California Division of State Architect. The Division of State Architect, however, did not review methane mitigation plans. Developers were routinely referred to the Los Angeles Fire Department for assistance even though the Fire Department had no statutory authority to review any plans involving public school construction.

[32] This apparent jurisdictional ambiguity was addressed by the California Legislature in 1999 with the passage of Assembly Bill 387 (Wildman) and Senate Bill 162 (Escutia), relevant portions of which are codified at Education Code section 17213.1 *et seq.* Today, if a school district intends to build a school using any state funds, the California Department of Toxic Substances Control (DTSC) must give its approval that the site has been subject to a proper environmental assessment and that a sufficient plan has been developed to remediate and mitigate any environmental hazards.

apply the stringent Methane Seepage Zone regulations to the project based upon the data supplied by Law/Crandall and further noted that, if methane were found south of Colton, "additional methane measures would be required."[33] (See map "Los Angeles Methane Seepage Zone," below.)

Los Angeles Methane Seepage Zone

Minutes from a February 27, 1997, Owner, Developer, Architect, Contractor (ODAC) meeting, indicate that TBP prepared a letter to the Fire Department regarding the extent of methane protection that the Fire Department would require at the school site. The minutes also indicate that TBP was awaiting Law/Crandall's supplemental report to provide up-to-date information about what further measures needed to be taken at the site to mitigate the methane problem.[34]

[33] Los Angeles Fire Department File: Belmont Complex, Inspector Gould's meeting notes (January 21, 1997). Inspector Gould also noted that the Department of Building and Safety might have required the entire site to be classified as a "methane site" but for the fact that it was outside the methane district, the state of the investigative data, costs, and because reasonable precautions were being taken.

[34] Owner, Developer, Architect, Contractor Meeting Minutes (February 27, 1997).

A March 6, 1997 letter from Ken Reizes of TBP to the Fire Department referenced the January 21, 1997 meeting with Inspector Gould, and stated that the BLC site was impacted by methane from the old Los Angeles Oil Field that cut through a portion of the site north of Colton.[35] Ken Reizes noted that Sepich had been retained to design a methane gas control system for affected buildings north of Colton, and requested Fire Department review of the project. The Reizes letter states:

> In as much as this site is not located in a Potential or High Potential Methane Zone, (as defined by the Los Angeles, Memorandum of General Distribution #92, or Division 15 of the Building Code) and the Department of Building and Safety does not have jurisdiction for this project, and the Office of State Architect does not check for this type of condition, we respectfully request that your office review our plan and provide the necessary permits and documentation so that we may proceed to finalize the construction documents for the Project.[36]

Soil gas reports. On March 10, 1997, Law/Crandall reported to LAUSD and TBP the initial findings (March Report) of its geo-technical and environmental investigation. It concluded that *there were significant levels of methane localized in several areas on the 11-acre site north of Colton, but that the 24 acres to the south were unaffected.*[37]

Two days later, a further meeting was held with Inspector Gould at the Los Angeles Fire Department.[38] The Fire Department was briefed on Law/Crandall's conclusion of no methane south of Colton. Accordingly, it was agreed that John Sepich should proceed with plans for design of methane control systems for the buildings and paved areas, focusing solely on affected areas north of Colton.

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[35] Los Angeles Fire Department File, Belmont Complex: letter from Ken Reizes, Temple Beaudry Partners, to Captain Jesse Pasos, Los Angeles Fire Department (March 6, 1997).

[36] *Id.*

[37] Law/Crandall Environmental Testing and Report Review (March 10, 1997).

[38] Los Angeles Fire Department File, Belmont Complex, meeting notes from Inspector Joe Gould. Present at the meeting were: Inspector Gould, Los Angeles Fire Department Capt. Jesse Pasos; Ken Reizes; Elmond Wan, Turner Construction; and Raymond Rodriguez, from the LAUSD.

The minutes from a March 13, 1997, Owner, Developer, Architect, Contractor (ODAC) meeting reflect discussion of the March 12, 1997 meeting at the Fire Department. The minutes indicate that the Fire Department, the LAUSD, and TBP all agreed that TBP (Kajima) would contact John Sepich to begin engineering a methane control system immediately. The minutes also indicate that TBP was waiting for Law/Crandall to issue its supplemental report (May Report) and to give a copy to the Fire Department.[39]

On April 24, 1997, Dominic Shambra, acting on behalf of the LAUSD, signed a contract with Sepich and his company, Methane Specialists, to design a methane control system for the Field House building north of Colton Street.[40] According to the contract, Sepich was to be paid $38,000 to design and obtain permits for the system.[41] The contract provided that:

> In meetings between Kajima,[42] representatives of the LAUSD, the OSA, and the City of Los Angeles Fire Department it has been determined that the methane hazard area will be exclusively that area north of Colton Street. Areas south of Colton are not considered to have methane hazard.[43]

Law/Crandall's supplemental report was issued on May 29, 1997 (May Report) and, significantly, concluded even more strenuously that the 24 acres were free of methane concerns:

> Based on the previous reports by others, the areas with high methane gas levels occur north of Colton Street in the subsurface soils beneath the proposed sports stadium, tennis courts, and baseball field. *Methane gas associated with the oil field had not been identified in the subsurface soils south of Colton Street in the areas of the*

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[39] Owner, Developer, Architect, Contractor Meeting Minutes (March 13, 1997).

[40] The Sepich contract was sent to the attention of Kajima and Ken Reizes on April 14, 1997. It set forth the necessary steps under state and local statutes and described the design and permitting process that Sepich and Associates would perform.

[41] The cost for the actual construction and installation of the methane control system at the Field House and associated hardscape would later be estimated at $107,495. *See* Methane Specialists written cost estimate to Ken Reizes dated August 25, 1997.

[42] Reference here is to Temple Beaudry Partners.

[43] Contract from Sepich Associates, Inc. and Methane Specialists signed by Dominic Shambra on behalf of the Los Angeles Unified School District on April 24, 1997.

> *proposed school building, offices, and to other associated enclosed structures.* Based on previous methane studies by others and LAW's observation and analytical testing of geo-technical soil samples collected from the site, *it appears that methane gas does not pose a significant environmental concern in the areas of proposed enclosed structures south of Colton Street.* (Emphasis added.)

Los Angeles Fire Department approval of methane control system for north of Colton. On June 11, 1997, Ken Reizes wrote to the Fire Department and enclosed a copy of the Law/Crandell May Report that indicated that there were no significant concerns of methane south of Colton. Reizes noted that Sepich had been retained to design the methane control system for the 11 acres, and that drawings and other work were being prepared for Fire Department review.[44] Sepich began to draft the plans for the methane control system and submitted those plans to the Los Angeles Department of Building and Safety and Los Angeles Fire Department in the fall of 1997.[45] *After a review and several revisions of the plans, the Los Angeles Fire Department approved the design and issued a permit on January 21, 1998, for a methane control system for the Field House north of Colton Street.*[46] *The Department of Building and Safety followed with its approval on February 3, 1998.*[47]

Ground was broken at BLC on August 25, 1997, and mass grading of the site began. Law/Crandall was retained to perform geo-technical work and to provide on-site monitoring of

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[44] Temple Beaudry Partners letter to Los Angeles Fire Department Capt. Jesus Pasos (June 11, 1997).

[45] Los Angeles District Attorney's Office interview of John Sepich (May 31, 2001); *see also* Los Angeles District Attorney's Office interview of Hugh Avery, environmental inspector and consultant to Sepich Associates (April 10, 2002).

[46] Los Angeles City Fire Department Permit # 89959 (January 21, 1998).

[47] Los Angeles Department of Building and Safety approval letter for the methane control system (February 3 1998). The Department of Building and Safety also notes: "The design and construction of the proposed school project is not within the jurisdiction of the Department of Building and Safety. However, at the request of Sepich, the report is being reviewed for conformance with the L.A. City requirements for new construction within a "Potential Methane Zone," as defined in the L.A. City Building Code. It is understood that Departments (sic) review is for the use of the L.A. Unified School District and to the Department of the State Architect." *See also* Hugh Avery's work reports to Sepich for further information (January 1998).

methane and hydrogen sulfide during excavation, grading, and construction. Law/Crandall submitted a site methane-monitoring plan to Ken Reizes of TBP on September 24, 1997.[48]

Soil gases discovered south of Colton. During grading near the proposed administration building, workers began to report the presence of soil gases. On November 4, 1997, Joe Walton of Turner/Kajima reported a hydrogen sulfide odor from a utility trench near Beaudry and Mignonette Streets. Efforts to scientifically document those anecdotal reports proved problematic. The next day, Ecology Control Industries (ECI) excavated the same area to a level of three feet and detected no hydrogen sulfide. Five days later on November 10, 1997, after VOC meter testing, LAUSD Environmental Health and Safety Branch representative Richard Liu pronounced that the area was clear to resume construction.[49]

On December 15, 1997, Joe Walton of Turner/Kajima again reported hydrogen sulfide odors during excavation between Boylston and Bixel Streets near Mignonette (west of the proposed administration building). Richard Lui went to the site to investigate. Gary Dorn of Law/Crandall stated that he was receiving readings of 200 ppm for hydrogen sulfide. Readings taken by Dorn in Lui's presence, however, showed 0 ppm for organic vapors. The next day, December 16, 1997, Don Dennis of Turner/Kajima again reported hydrogen sulfide odors. The LAUSD sampled this area for soil gas with negative results.[50] In addition, the LAUSD took two soil samples from the affected area for laboratory analysis, again with negative results.

On January 2, 1998, Law/Crandall began to systematically test for volatile organic compounds. Volatile organic compounds are organic chemicals that evaporate at ambient temperature and pressure. These tests detected the presence of low levels of soil gas from soil

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[48] Law/Crandall letter to Mr. Kenneth J. Reizes, Temple Beaudry Partners (September 24, 1997); and Law/Crandall's Methane and Hydrogen Sulfide Monitoring Plan (September 24, 1997). Law/Crandall performed and logged daily geo-technical tests at the site in 1997 forward. (Geo-technical analysis involves tests for soil conditions such as density and moisture to determine stability for construction). Systematic hourly testing for hydrogen sulfide and methane did not begin until January 2, 1998. *See* Law/Crandall Belmont Learning Complex daily Geo-technical Field Summary Reports and Field Activity Daily Logs.

[49] Richard Lui, Environmental Health and Safety Branch Memorandum to Roger Friermuth, Facilities Project Manager (November 10, 1997). Richard Lui noted that LAUSD personnel took a measurement on November 4, 1997 for hydrogen sulfide gas resulting a reading at less than 3 ppm.

[50] Richard Lui, Environmental Health and Safety Branch Memorandum to Roger Friermuth Facilities and Construction Branch (December 18, 1997). Richard Lui noted that the results of the LAUSD soil gas test showed minute concentrations of petroleum hydrocarbons volatile organic compounds and undetectable levels of semi-volatile organic compounds. He concluded that, "such concentrations do not require remedial action."

freshly excavated or graded,[51] but did not specify whether they were methane and/or hydrogen sulfide. However, a Law/Crandall Field Activity Log dated January 8, 1998, notes that "most of what we are reading is most likely methane."

Ken Reizes contacted John Sepich on January 9, 1998, and requested that Sepich investigate these issues.[52] According to Sepich, Ken Reizes informed him in a telephone call that Law/Crandall had obtained readings of volatile organic compounds coming out of the soil during grading activities south of Colton. Accordingly, Reizes requested that Sepich undertake a methane survey there.[53] Sepich agreed that his firm could do the work.

Notice to the Fire Department about newly discovered methane. On January 21, 1998, Hugh Avery, Sepich's representative, informed Inspector Joe Gould of the Los Angeles Fire Department that methane had been found south of Colton Street and that further mitigation measures and monitoring at the site appeared necessary.[54]

In Sepich's February 20, 1998 proposal, he agreed to install up to 12 probes on the 24-acre site to monitor for soil gases including methane where school buildings were about to be constructed.[55] The proposal was accepted and testing began. On March 30, 1998, Sepich sent TBP (Kajima) the test results concluding that methane and hydrogen sulfide gas *were* present in the new probes south of Colton."[56]

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[51] Law/Crandall Field Activity Logs frequently recorded volatile organic compounds (VOC) concentrations from zero parts per million (ppm) to the low hundreds, with occasional readings up to one thousand parts per million (ppm) (January 1998).

[52] Los Angeles District Attorney's Office interview of Ken Reizes (April 11, 2002). *See also* written telephone message for John Sepich from Ken Reizes (January 9, 1998). Turner/Kajima further briefed Sepich Associates on the soil gas issue on January 19-20, 1998. See Hugh Avery's work reports to Sepich Associates (January 19–20, 1998).

[53] Los Angeles District Attorney's Office interview of John Sepich (May 31, 2001).

[54] Los Angeles Fire Department File: Belmont Complex notation by Inspector Joe Gould dated January 21, 1998. *See also* Los Angeles District Attorney's Office interviews of Inspector Joe Gould (April 5, 2002) and Hugh Avery (April 10, 2002).

[55] Sepich proposal to Kajima dated February 20, 1998. Five days later on February 25, 1998, Ken Reizes wrote to Ray Rodriguez from the LAUSD reminding him, that pursuant to the Development and Disposition Agreement, the LAUSD was responsible to pay the bill. His approval therefore was necessary. *See* Kajima letter to Ray Rodriguez, LAUSD (February 25, 1998).

[56] Sepich Memorandum to Kajima/Turner, and the LAUSD (March 30, 1998).

Mitigation measures for south of Colton. Based on this new data, Sepich was asked to design a methane control system for the school buildings south of Colton Street. Sepich drafted an "Additional Methane Design" proposal that was submitted to TBP on April 22, 1998. The design called for methane barriers and venting to be placed under impacted buildings and adjacent paved areas.[57]

TBP (Kajima) project executive Ken Reizes advised the LAUSD's representative, Paul Hurley, of the barrier and venting design and cost. That cost would be the responsibility of the LAUSD. Reizes wrote:

> On Tuesday, April 21, 1998, Ray [Rodriguez, LAUSD], Elmond [Wan,Turner/Kajima], and I met with John Sepich, the Methane Consultant regarding the finalization of his methane gas study for Area 3. Based on the results of borings and study performed, Sepich advised us that methane was found in excess of the minimum allowed, and therefore a methane membrane and other requirements would be required for Academy 1, the Administration & Administration & Multi-Purpose Buildings and adjacent paved areas.[58]

Sepich was retained to design the methane control system for south of Colton Street and Sepich and his company were at work doing so by April 30, 1998.[59] TBP and LAUSD received Sepich's drawings on June 3, 1998. Paul Hurley (from Daniel, Mann, Johnson and Mendenhall, an independent construction oversight consulting firm hired by the LAUSD), was concerned about the costs involved and requested that the plans be peer reviewed by SCS Engineers.[60]

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[57] Sepich's Additional Methane Design (April 22, 1998). John Sepich billed $28,000 for the initial design, and a further $37,500 for on site inspection, shops drawing review and other services that may be required.

[58] Kajima letter to Paul Hurly, DMMJ/LAUSD (April 22, 1998).

[59] Owner, Developer, Architect, Contractor (ODAC) minutes (April 30, 1998), where it was noted that: The final design is due on June 29, 1998. Turner/Kajima stated that it is imperative to receive the final design as scheduled due to the fact that the concrete foundation for Academy House 1 is scheduled to begin installation on 6/26/98."

[60] Paul Hurley, DMJM letter to Sepich (undated). *See also* ODAC Minutes (July 13, 1998) and SEC Engineers Peer Review of Sepich's system (September 8, 1998).

After the designs and proposed costs to LAUSD were reviewed, LAUSD Superintendent Rubin Zacarias was informed on July 17, 1998 that the estimate for installing the site-wide methane control system for all the Belmont buildings was in the range of $1.2 to $1.5 million.[61]

Turner/Kajima solicited bids from subcontractors to implement the Sepich design. D/K Mechanical submitted the lowest bid and thus was awarded the contract on July 30, 1998 for methane gas control and vent piping for Academy House, the Multi-purpose Building, the Administration Building, and the Field House.[62] Gergen Construction was the low bidder for construction of the methane barrier part of the project and signed a contract on August 5, 1998.[63]

On September 8, 1998, SCS Engineers completed a peer review of John Sepich's methane control system concluding that it complied with applicable standards. SCS also made several changes to the design.[64] LAUSD, Sepich, and Turner/Kajima agreed that the changes could be incorporated into Sepich's design and be presented to the Los Angeles Fire Department before the project was delayed beyond the projected completion date.[65] Sepich prepared the revised design and gathered the documentation for the Fire Department. On October 1, 1998, Sepich, TBP, and LAUSD presented to the Fire Department a revised design for a methane control system for the affected Belmont buildings south of Colton.[66]

Jurisdictional problems: LA Fire Department declines, and DTSC undertakes, regulatory authority. At that October meeting, the Fire Department (Inspector Andy Gutierrez) raised concerns about its involvement and advised that it did not have jurisdiction or authority to

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[61] Confidential Memorandum from Beth Louargand to Superintendent Ruben Zacarias (July 17, 1998).

[62] Turner/Kajima/DK Mechanical contract (July 30, 1998). The contract price was for $185,906.

[63] Turner/Kajima/Gergen Construction contract (August 5, 1998). The contract price was for $246,263 and included only Academy House 1. Contracts were yet to be awarded for the barriers for the other affected structures.

[64] John Sepich noted that the changes served to lower the price of the methane control system. *See* Los Angeles District Attorney's Office interview of John Sepich (April 19, 2002).

[65] ODAC Minutes (October 1, 1998). It should be noted that Turner/Kajima was scheduled to install the concrete slab under Academy House 1 on October 26, 1988, but did not go forward with the pour because they lacked Fire Department approval for the Methane Control System, which was to be installed under the slab. This delay caused the LAUSD to incur delay costs and pushed the project beyond its scheduled completion date.

[66] The record is unclear as to who attended this meeting at the Los Angeles Fire Department beyond Fire Inspector Andy Gutierrez and John Sepich. It appears that Ken Reizes and Ray Rodriguez also attended.

review or approve school construction plans, including plans for a methane control system.[67] Nevertheless, Inspector Gutierrez began a review of the plans but told John Sepich that the Division of State Architect would have to approve of the Los Angeles Fire Department's review.[68] Sepich continued to meet with the Fire Department on this issue.

Inspector Gutierrez agreed to meet with the Division of State Architect in order to obtain authority to review the design.[69] That meeting, however, never occurred.[70] LAUSD drafted a letter to be used by the Division of State Architect in which it approved of the Los Angeles Fire Department's review of the Belmont methane control system. That letter was signed by Division of State Architect Regional Manager Jack Bruce and was provided to the Fire Department.[71] Although the Fire Department continued to review and assist with the design, the Fire Department's position remained that it did not have jurisdiction to approve the project and to issue the permit for construction of the methane mitigation system. Ultimately, the Sepich design was not installed at BLC.[72]

On February 22, 1999, LAUSD entered into a "Voluntary Corrective Action Agreement," with the Department of Toxic Substances Control (DTSC), that vested authority with the Department to approve all environmental remediation and mitigation, measures, including methane

[67] Los Angeles District Attorney's Office interview of Los Angeles Fire Department Inspector Andy Gutierrez (April 9, 2002).

[68] Sepich letter to Andy Gutierrez, Los Angeles Fire Department (October 7, 1998). John Sepich recaps the October 1, 1998 meeting focusing on discussion of the electronic monitoring gas detection system. Attached to the memo is Division of State Architect information to local fire departments advising local departments that DSA projects should comply to local fire codes with respect to methane control systems. It goes on to note that inspections are still done by the LAFD with respect to the electronic methane detection system.

[69] Los Angeles District Attorney' Office interview of Hugh Avery (April 10, 1998). *See also* work report of Hugh Avery to Sepich (October 21, 1998).

[70] On November 24, 1998 Ken Reizes advised the LAUSD that pursuant to LAUSD instructions, construction of the methane barrier was on hold. *See* Kajima letter to the LAUSD (November 24, 1998).

[71] LAUSD/DSA approval letter (December 9, 1998).

[72] The DTSC on November 17, 1998, informed the LAUSD the Belmont site had not been properly characterized for environmental contamination. On December 23, 1998, David Koch, the LAUSD's Chief Administrative Officer, informed the Board of Education that the Safety Team had been given authority to review the Methane Control System and seek DTSC approval for the site. *See* Memorandum from David Koch to the Board (December 23, 1998).

control systems.[73] Nevertheless, to date, DTSC has *not* provided LAUSD with the approval it has needed in order to go forward.

Analysis of methane and hydrogen sulfide issues. Based on information available to the owner and builder prior to construction, particularly the May, 1997 Law/Crandall report, a pre-construction strategy of mitigating potential soil gas south of Colton Street as dictated by actual conditions encountered during construction did not give rise to any felony criminal violations.

Prior Belmont environmental studies undertaken for other purposes also considered methane and hydrogen sulfide soil gases issues. Some of those studies found low levels of methane and hydrogen sulfide south of Colton Street and raised the possibility of more undetected gas. At least one of those studies prompted concern on the part of LAUSD Health and Safety Branch representative Richard Lui in November and December 1996. During that time period, contract negotiations were on-going and cost estimates and work responsibilities were being examined. The environmental testing firm of Law/Crandall was brought in to conduct an environmental assessment of the site including an analysis of all previous environmental studies.

Law/Crandall concluded in March of 1997 that:

> Significant levels of methane [were] localized in several areas on the 11-acre site north of Colton, with the majority of the entire site being relatively unaffected.

In May of 1997, Law/Crandall revised its conclusion which became more specific about conditions south of Colton:

> *Methane gas* associated with the oil filed *had not been identified* in the subsurface soils *south of Colton* street in the areas of the proposed school building, offices, and other associated enclosed structures...it appears that methane gas *does not pose a significant environmental concern* in the areas of the proposed enclosed structures south of Colton Street. (Emphasis added.)

[73] Docket No. HSA 98/99-031.

There is no evidence to establish that the various parties were not justified at the time in relying on Law/Crandall's conclusions.

In addition to Law/Crandall's specific findings, other circumstances support the reasonableness of a mitigate-as-needed strategy for the structures south of Colton Street. Generally, the Belmont site was not unlike many other similar situated properties throughout the Los Angeles basin that are potentially also subject to methane, but where no methane mitigation methods are employed. The Belmont site was outside of the "High Potential Methane Zone" and the "Potential Methane Zone" as identified by the City of Los Angeles. Most of the site lay outside the boundaries of the Los Angeles Oil Field. The land had been not been used for major environmentally suspect manufacturing or refining operations, and instead, had been used for residential purposes for several generations.

Further, the extensive excavation and grading that would occur during the first phases of the construction could have uncovered previously unknown soil gas and other soil conditions. This inherent uncertainty provides support for the reasonableness of a mitigate-as-needed approach.

According to methane specialist John Sepich, mitigate-as-needed strategies are commonly used and are the industry standard. Methane mitigation systems are not particularly difficult to implement or modify in order to meet the changing conditions that may be encountered during construction. For example, Sepich relates that during construction of the Los Angeles Central Library, levels of methane significantly greater than were found at Belmont were discovered during excavation and construction. He designed the methane mitigation system for the Central Library which is in operation and functioning successfully, protecting the library and its frequent school children users.

While Geomatrix concluded more recently (August 2001) that there were sufficient data available to reach a decision to equip the BLC buildings and paved areas adjacent to the buildings with a methane and hydrogen sulfide gas mitigation system *before* the buildings were constructed,[74] Law/Crandall, who had been retained to resolve the question, took a different view in 1997. Law/Crandall concluded that methane gas was not found, nor did it pose a significant environmental concern, in the areas of the proposed structures south of Colton Street. LAUSD and TBP were justified in relying on Law/Crandall's conclusion, taken as a "green light" to continue school construction. Law/Crandall reviewed all relevant prior environmental reports, including the ENV

[74] Geomatrix Consultants, Inc., *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001) at 47.

America report that caused Richard Lui's concern. Based on Law/Crandall's report, LAUSD and TBP plan to mitigate-as-needed during grading and excavation south of Colton Street was not unlawful.

It can be argued from hindsight that John Sepich's January 1997 original proposal, with an estimated cost of in the range of $2 million, should have been implemented in the project prior to commencement of construction. However, that proposal was highly preliminary in nature. It provided a cost estimate for a most expensive case scenario of mitigating all structures on the entire site. Based on then-existing information as reported by Law/Crandall, an actual $2 million expenditure to protect all the project buildings, including those south of Colton Street, from soil gases would not have been justified in mid-1997. Adoption of the mitigate-as-needed strategy during construction does not give rise to criminal violations.

It has also been alleged that there was a "cover-up" and that known methane conditions at Belmont were hidden or understated. However, the evidence shows there was no cover-up and that the owner and the builders engaged in prudent efforts to responsibly address the methane and hydrogen sulfide soil gas problem as soon as they were uncovered. From the beginning, the Los Angeles Fire Department was involved in the oversight and supervision of the soil gas question even though the Fire Department ultimately concluded it had no specific jurisdiction to do so. A methane and hydrogen sulfide gas mitigation system was designed and approved for the areas north of Colton Street where Law/Crandall and others had verified the presence of the gases.

Once reports received during excavation *south* of Colton Street suggested the presence of methane and hydrogen sulfide gas, action was promptly taken to notify the Fire Department and to obtain further testing in order to ascertain the magnitude and scope of the problem. Thereafter, a system was designed for the impacted structures south of Colton Street. Once again, that process involved the Los Angeles Fire Department, the Division of State Architect, the Department of Building and Safety, and others. The proposed system was peer-reviewed by another methane designer (SCS Engineering), and recommended changes were incorporated into the system design. Contractors were selected and contracts awarded to install the system.

There was no apparent financial incentive for the developers and builders to avoid or delay the installation of that system. Under the Disposition and Development Agreement (DDA), the cost of such a system was not the responsibility of TBP because methane mitigation costs were excluded from the Guaranteed Maximum Price (GMP). TBP's developer fee was fixed and was not in any way related to such an expense. In addition, the general contractor, Turner/Kajima, would

theoretically earn an added fee of 3% of the cost of such a system because it would have been a change order (not in the DDA) thus augmenting their overall compensation. Turner/Kajima's financial incentive was therefore to install a system, not to avoid its installation. *The evidence fails to establish a cover-up.*

Finally, it has been theorized that the delay between the first reports of soil gas in November and December of 1997, and the more definitive testing in February-April 1998 allowed the podium/parking structure to be hurriedly constructed without a methane barrier before the presence of methane could be verified. The evidence does not support such a theory. Actions were undertaken by LAUSD, and others, in an effort to document the anecdotal reports of gases in the trenches. Richard Lui from the LAUSD Environmental Health and Safety Department promptly responded to the report locations and attempted to verify the presence of the gas. On January 2, 1998, Law/Crandall was hired to conduct systematic gas sampling during the excavation and grading at the site. Ultimately, in February 1998, Sepich Associates was retained to conduct the extensive testing with borings that ultimately confirmed the methane south of Colton.

The delay from November to February in commencing the more comprehensive boring testing procedure is understandable. Reasonable efforts to assess the implications of the reports from the trenches and to understand the soil potential gas problems are demonstrated by the testing and analysis work of Richard Lui and Law/Crandall in November, December, and January.

Moreover, the evidence fails to establish that a known methane problem was ignored so that the BLC could be hurriedly constructed. In fact, the podium/parking structure foundation was already in place before the methane was first reported during excavation and grading in other areas south of Colton. Later constructed buildings were modified to accommodate the installation of a barrier system that was awaiting design and approval. Construction continued with the modified buildings to avoid delay costs for which LAUSD would be liable. The evidence does not show that a known methane problem was ignored while the BLC was hurriedly constructed. The state of this evidence does not give rise to any prosecutable felony crime.

Conclusion. The methane and hydrogen sulfide gases at BLC were neither contained nor discarded, and without such attributes these gases do not meet the statutory definition of "hazardous

waste" under California law.[75] Once methane was discovered south of Colton the authorities acted prudently in preparing a mitigation response. No "cover-up" of methane conditions is indicated by the evidence. Accordingly, there is no provable criminal conduct related to the above cited environmental statutes.

D. Other Potentially Relevant Criminal Statutes

Corporate Criminal Liability Act. We have discussed the allegation that LAUSD, TBP and Turner/Kajima failed to timely disclose material facts regarding the presence of methane and hydrogen sulfide and whether any crimes might thus have been committed under environmental statutes. Now we consider whether this same allegation would trigger application of another law — Penal Code section 387, the Corporate Criminal Liability Act. The Act imposes criminal penalties on corporations and managers who have *actual knowledge* of, and fail to timely report, serious *concealed dangers* that are subject to regulatory authority and are associated with a product or business practice. In order to prove a violation of this Act, the evidence must establish the following elements:

- The subject is a corporation, limited liability company, or a person who is a manager;
- *Actual knowledge*;
- A *serious concealed danger* associated with the product or a business practice;
- The danger is *subject to regulatory authority*; and
- A *failure to timely report* the danger to the regulatory authority, or a failure *to warn employees*.

Section 387(b)(4) provides in pertinent part that:

'Serious concealed danger,' used with respect to a…business practice, means…the exposure of an individual to…the business practice creates a substantial probability

[75] *See* Health and Safety Code section 25110.11.

> of death, great bodily harm, or serious exposure to an individual, and the danger is not readily apparent to an individual who is likely to be exposed.
>
> Subsection (b)(6) provides in pertinent part that:
>
> 'Serious exposure' means any exposure to a hazardous substance, when the exposure occurs as result of an incident or exposure *over time and to a degree or in an amount sufficient to create a substantial probability that death or great bodily harm in the future* would result from the exposure. (Emphasis added.)

While methane and hydrogen sulfide gases in certain forms and quantities may present serious health risks, according to the evidence in this case the gases were not "serious concealed dangers" under the statute because the gases were not associated with a product or a business practice; and, there is no evidence that any person had been exposed to methane and hydrogen sulfide over time and to a degree or in an amount sufficient to create a "substantial probability" that death or great bodily harm in the future would result.

The evidence does not warrant any prosecutions under the Corporate Criminal Liability Act.

Felony littering. It has been alleged that by allowing naturally-occurring methane and hydrogen sulfide gas belonging to LAUSD to collect in or under LAUSD buildings, the developers, contractors, and others violated Penal Code section 374.8. Subsection (b) of Penal Code section 374.8 provides:

> Any person who *knowingly causes* any *hazardous substance* to be *deposited* into or upon any road, street, highway, alley, or railroad right-of-way, or upon the *land of another*, without the permission of the owner, or into the waters of this state *is punishable* by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for a term of 16 months, two years, or three years, or by a fine of not less than fifty dollars ($50) nor more than ten thousand dollars ($10,000), or by both the fine and imprisonment, unless the deposit occurred as a result of an emergency that the person promptly reported to the appropriate regulatory authority.

In order to sustain a conviction under this section, the evidence must establish that a person or entity knowingly, caused a hazardous substance to be deposited, upon a road, street, highway,

alley, a railroad right-of-way, land of another, or into state waters. Applying this statute, some might reason in the following manner: methane gas was trapped by the parking structure without a suitable barrier and thus became a "hazardous substance" that has been "deposited;" that the contractor deposited that methane upon the land of another (land belonging to LAUSD), when the buildings, constructed without a suitable barrier, captured the gas; and further that one can infer that the deposit was made "knowingly" because the contractor was aware that a methane barrier was needed but did not install one prior to construction when it would have been most affordable and effective.

It has further been alleged that a violation of section 374.8 occurs once the methane gas has been contained in or under a structure, and hence "deposited." The fact that all parties, including the LAUSD as landowner, may have intended to add the barrier before construction was complete is irrelevant since the crime already occurred. The failure to install the barrier prior to raising the structures could be analogized to finishing an electrical system without the safety-mandated circuit breakers.

Such an interpretation of Penal Code section 374.8 would make criminal the construction of any structure, including a barrier system, that on at least one occasion had the known collateral effect of concentrating naturally occurring methane gas. Such an interpretation of section 374.8 cannot be defended, as it would equate the inadvertent capture of a naturally-occurring hazardous gas with the deposit of a hazardous substance. Such an interpretation goes well beyond the plain meaning of the language of this "felony littering" statute. Not surprisingly, there is no case law construing the statute in such a manner, and the legislative history does not support such an interpretation.

The interpretation also ignores the fact that any "deposited" gas in issue actually belongs to LAUSD, thus failing to satisfy the requirement of "on the land of another." The contractor would be acting as the owner's agent in "depositing" the gas, and therefore it is the owner who would be actually "depositing" hazardous materials on its own land, an activity not prohibited by the statute. While the activity would constitute a crime by the contractor (who would be acting at the direction of the owner), it would not be for the owner.

Prosecution under such a theory also would require proof that methane and hydrogen sulfide gas had actually been concentrated. No known pre-existing or existing data provide a standard against which post-construction methane and hydrogen sulfide levels can be compared.

All that the evidence establishes is that the parties intended to correct the problem during construction once its nature and scope were ascertained and a consensus reached on the proper mitigation methods.

The District Attorney's Office concludes there is no basis to support a prosecution for violation of Penal Code section 374.8 for "depositing" hazardous materials by commencing construction of the Belmont structures before installing a methane barrier.

Grand theft. It has been alleged that the methane and hydrogen sulfide gas conditions were intentionally understated by the developer so that the LAUSD would be deceived and funds allegedly earmarked for mitigation systems could be "quietly" used for other purposes, which raises the issue whether these funds were misappropriated, in violation of Penal Code section 487. These allegations are not supported by the evidence.

As already mentioned, during the exclusive negotiations phase of the project, a $2 million clean-up allowance was initially included in the Temple Beaudry Partners' proposed budget. This allocation was consistent with the RFP/RFQ that assigned responsibility for any possible site environmental mitigation and remediation to the developer. Later, as part of the negotiation process, LAUSD assumed financial responsibility for any possible environmental clean-up costs. There were valid reasons for doing so. Accordingly, the $2 million allowance item for clean-up was removed from TBP's proposed budget. Consistent with the negotiated terms of the Disposition and Development Agreement (DDA), site clean-up expenses for various activities such as oil well abandonment and removal of oil impacted soils were paid as extras by the LAUSD. To date, LAUSD has spent more than $7 million on clean-up. The $2 million "Subsurface & Hazmat" clean-up allowance was merely a preliminary budget line item. It was not an account or other repository of actual funds that had been set aside for site environmental clean-up purposes. There is no evidence to demonstrate that any funds were misappropriated and thus prosecution under Penal Code section 487 based on a misappropriation theory would fail.

A further theory of prosecution under the grand theft statute has been suggested. The charge is that a host of factors — TBP's success in negotiating away its responsibility for environmental clean-up as specified in the RFP/RFQ, LAUSD's incentive to keep estimated school construction costs below the SAB maximum allowable, the erroneous Law/Crandall conclusion of "no methane concerns for the buildings south of Colton Street," and then the subsequent discovery of methane south of Colton — together raise the inference that fraud and collusion, resulting in grand theft by

false pretenses, occurred. However, these generalized suspicions are insufficient to establish the commission of any felony crime, for the following reasons:

There is no evidence that the Law/Crandall report was intentionally false or misleading. There were valid reasons for LAUSD to assume environmental clean-up responsibility. LAUSD could assure itself that the environmental problems were adequately addressed and that costs would be minimized. TBP was generally unwilling to guaranty those unknown costs and could be expected to apply a "worst case" cost scenario and, if forced to do so, would charge accordingly. In contrast, if it shouldered the responsibility, LAUSD would pay only the true costs and there would be less potential for waste.

Implicit in these circumstances is a suspicion that LAUSD was "duped" or manipulated into entering a bad contract. However, the contract negotiations, including matters of developer project responsibility, developer fees, and other forms of developer compensation, were subjected to intense review on behalf of the LAUSD by its independent Oversight Committee. These matters were also subjected to media attention and public comment at Board hearings. Ultimately, the terms were a part of the DDA that the Board approved in an open meeting on April 1997.

Based on the evidence, prosecution under Penal Code section 487 on either misappropriation or theft by false pretenses theories cannot be supported.

Child endangerment. The District Attorney's Office also considered a possible application of Penal Code section 664/273a, attempted child endangerment, on the theory that construction of the school was intentionally commenced without first installing a methane and hydrogen sulfide gas barrier that was known to be needed. A felony violation of Penal Code section 273a occurs when, under conditions likely to produce great bodily injury or death, a person willfully causes a child to suffer, or when a person having custody of a child willfully permits that child to be placed in a situation where the child's health is endangered.[76] The crime of attempt, found in Penal Code section 664, requires proof of *specific intent* to commit the underlying crime together with a direct but ineffectual act done towards its commission.[77]

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[76] CALJIC No. 9.37, 1998 Revision (Pocket Part for 6th ed. 2002).

[77] CALJIC No. 6.00 (6th ed. 1996).

The evidence to date does not support a prosecution based on such a theory. At the outset, the completed crime of child endangerment in this context could only occur if the school were completed and occupied, and neither has occurred. At most, an attempt crime could be contemplated on these facts.

Moreover, the evidence fails to establish the specific intent by any party to knowingly complete construction without the needed barrier and then admit children to the school. There was a plan in place for a mitigation system north of Colton where methane and hydrogen sulfide gases were known to be present. Construction began without a plan for a mitigation system on the site south of Colton because no soil gas problems were *then* known. There is insufficient evidence to prove that any party had knowledge, before construction, of the presence of methane and hydrogen sulfide gases in quantities sufficient to warrant such a mitigation system. Later, when the presence of the gases south of Colton was actually detected and verified, construction plans were modified and schedules revised to allow for installation of the needed methane and hydrogen gas mitigation system. All appropriate regulatory agencies were involved in the decision process as the system was being designed. Ultimately, school construction ceased entirely as the implications of methane and hydrogen sulfide gas issues were debated.

The evidence does not warrant a prosecution under Penal Code section 664/273a because it cannot be established that any party intended to build a school and admit the students without first mitigating any possible danger.

Conspiracy/seepage zone requirements. Finally, allegations have been raised that persons responsible for installation of the methane and hydrogen sulfide gas mitigation systems violated Penal Code section 182 (felony conspiracy) by conspiring to violate misdemeanors found in the Los Angeles Municipal Code (LAMC) regulating methane and hydrogen sulfide gas conditions. A conspiracy to commit a misdemeanor can elevate the offense to a felony in which punishment can include incarceration in state prison. Generally, proof of a conspiracy requires evidence of an agreement to violate a law or commit an unlawful act, along with some overt action taken by at least one conspirator in furtherance of the conspiracy.

A misdemeanor provision of the LAMC, section 11m, requires that new building construction located within the "High Potential Methane Zone" and "Potential Methane Zone" must include methane control systems to mitigate methane gas. Those zones are located exclusively in the Fairfax area of Los Angeles. The ordinance was enacted in 1985 after a methane gas explosion occurred at the Ross Dress-For-Less department store on Fairfax Avenue. Regulations call for the

installation of a passive methane control system, including a barrier, vent piping, and gas detectors. Also, the Los Angeles Department of Building and Safety is vested with the authority to declare that an area outside of the methane zones is subject to the Methane Seepage Zone regulations if a potential methane hazard is present. (LAMC section 91.7108.)

It has been claimed that LAUSD, TBP, and others conspired to violate the Methane Seepage Zone regulations. There is no evidence to support this allegation. As discussed earlier, BLC is not located within the High Potential Methane Zone or the Potential Methane Zone, and the Los Angeles Department of Building and Safety did not make a determination that the site contained a potential methane hazard. Hence, the ordinance does not apply to the Belmont project. In fact, the Los Angeles Department of Building and Safety explicitly stated on February 3, 1998, that it had no jurisdiction over the construction of the BLC.[78] Accordingly, the evidence fails to establish that Methane Seepage Zone regulations are applicable to be Belmont project, and prosecution for a conspiracy to violate those regulations is declined.

E. Impacted Soil

It has been suggested that various environmental laws were violated when allegedly contaminated soils and hazardous wastes were improperly transported, stored, and disposed of during the Belmont construction grading and excavation process.

Conclusion in brief. The District Attorney's Office has investigated these allegations and has concluded that no prosecutable felony criminal violations occurred. Naturally-occurring crude oil is not a hazardous waste. Crude oil-impacted soil is also not a hazardous waste. Soil testing by Geomatrix and others has failed to establish that hazardous waste materials were disposed of on the site or transported off the site. The evidence fails to establish that crude oil-impacted soils and other materials and objects encountered during excavation and grading were handled and disposed of in an illegal or improper manner.

Terminology. The terms "impacted soils," "contaminated soils," and "hazardous waste" have appeared in various environmental reports and other documentation relating to the BLC site. These terms have been used in different ways, sometimes to describe the same soil samples. In order to understand the Belmont site environmental history and to avoid definitional confusion, it

[78] Los Angeles Department of Building and Safety letter (February 3, 1998).

is necessary to recognize the differing meanings of these terms and their varying usages in crucial documents.

Generally, "impacted soils" are soils that contain some other materials, whether hazardous or not. The term "contaminated soils" is likewise somewhat imprecise and means soils into which some other substance that may or may not be hazardous waste has been introduced. These two terms are often used interchangeably. Finally, "hazardous waste" is material that meets the specific legal criteria set forth in Health and Safety Code section 25117. Of major importance for the analysis of possible criminal liability, the terms "contaminated soils" and "impacted soils" do not necessarily signify that the soils are "hazardous waste."

Soil removal and oversight activities. Documents obtained through the California Department of Toxic Substances Control (DTSC) establish that the Los Angeles Fire Department and the California Regional Water Quality Control Board (RWQCB) were involved in the soil removal activities conducted at the Belmont site prior to the Department's direct involvement.[79] The evidence indicates that the primary material impacting the soil at the site was crude oil, and disposal of crude oil-impacted soils discovered during grading was performed under a RWQCB permit. Crude oil impacted soils that were excavated and replaced on site were done so according to guidelines of the RWQCB.[80] Finally, the Los Angeles City Fire Department oversaw the removal at the site of underground storage tanks (USTs) and the excavation and disposal of associated impacted soils.

Hydrocarbon-impacted soil was encountered intermittently during excavation and grading activities conducted from September 1997 through January 1999. In January 1998, a waste discharge permit was granted to the LAUSD from the RWQCB providing that up to 100,000 cubic yards of impacted soil could be exported to Bradley Landfill.[81] That waste discharge permit required that soil samples were to be collected at a frequency of approximately one per 1,000 cubic yards of material excavated, and that samples were to be analyzed for total recoverable petroleum hydrocarbons (TRPH) using Environmental Protection Agency (EPA) method 418.1. The maximum concentration of TRPH for discharge allowable under this permit was to be 1,000 mg/kg. This

[79] *Id.* at 30.

[80] Regional Water Quality Control Board, Interim Site Assessment and Cleanup Guidebook; Geomatrix, *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001) at 34.

[81] Regional Water Quality Control Board Permit (January 14, 1998).

permit was renewed four times.[82] The latest permit renewal granted was valid from January 25 through April 24, 1999. The RWQCB extended this permit by 90 days to July 22, 1999.

Impacted soils were segregated and stockpiled for testing.[83] Law/Crandall collected soil samples at a frequency of one sample per 1,000 cubic yards of material stockpiled as required by the permits.[84] Typically, test results would be summarized by Law/Crandall in a letter to the RWQCB requesting approval to export soil stockpiles to Bradley Landfill.[85]

In January of 1999, Law/Crandall collected soil samples from the pad area of the Multipurpose Building.[86] These soil samples were analyzed by several methods including: total petroleum hydrocarbons (TPH) using Environmental Protection Agency (EPA) Method 8015 modified; total recoverable petroleum hydrocarbons (TRPH) using EPA Method 418.1; Title 22 metals; volatile organic compounds (VOCs) using EPA Method 8260; semi-volatile organic compounds (SVOCs) using EPA Method 8270; organochlorine pesticides and polychlorinated biphenyls (PCBs) using EPA Method 8080; and acute aquatic fish toxicity by bioassay. Based on the results, Law/Crandall concluded that testing for TRPH and TPH was sufficient for characterizing the soils in issue to be exported to Bradley Landfill.[87]

In February of 1999, Environmental Strategies Company (ESC) and the DTSC collected soil samples in the area proposed for excavation near the Multipurpose Building. Two samples were collected from stockpiled soils in the center of the Multipurpose Building foundation excavation, and one sample was collected from exposed bedrock in the bottom of the foundation excavation. All three samples were analyzed for total recoverable petroleum hydrocarbons (TRPH) using EPA Method 418.1; BTEX using EPA Method 8021, and TPHg and TPH with carbon chain analysis

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[82] Law/Crandall letter to LAUSD regarding environmental soil testing program for soil disposal (February 22, 1999).

[83] *See* Law/Crandall daily logs and correspondence; *see also* Los Angeles District Attorney's Office interviews of Richard Lui (May 30, 2002), Mark Turner (August 15, 2001), Brian Arthur (August 17, 2001), Ken Reizes (August 7, 2001), and Steve Croasdale (July 6, 2001).

[84] LAUSD letter to the Regional Water Quality Control Board (January 6, 1998).

[85] Law/Crandall letter to the Regional Water Quality Control Board (October 12, 1998).

[86] Environmental Strategies Company memorandum to the LAUSD (February 22, 1999).

[87] Law/Crandall letter to LAUSD (February 22, 1999); Geomatrix Consultants, Inc., Errata (July 9, 2002) to *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001).

using EPA Method 8015 modified. None of the analyzed samples contained TPHg or BTEX at concentrations equal or greater than laboratory reporting limits. The highest concentration of TRPH was reported in the bedrock sample. Most significantly, ESC concluded that the hydrocarbon material detected in the bedrock sample was naturally-occurring.[88]

Evidence shows that 353,000 tons of soil excavated from the site were delivered to Scholl Canyon Landfill between September 2, 1997 and September 4, 1998.[89] In a May 13, 1999 to the Sanitation Districts, LAUSD indicated that the excavation and grading activities at the site were performed per the *Operational Procedures in the Event of Discovery of Oil Wells or Contaminated Soils,* which appear to be LAUSD guidelines.[90] LAUSD has maintained that these procedures included "visual inspection and screening of soils with an organic vapor analyzer (OVA)." LAUSD concluded its May 13, 1999 letter by stating that "contaminated soil was not transported to Scholl Canyon Landfill." Our interviews of Steve Croasdale and Richard Lui confirmed that the procedures of visual inspection and organic vapor analyzer (OVA) meter screening were properly followed.[91] There is no evidence that the LAUSD or Law/Crandall falsified data or engaged on a "cover-up."

Between March and August 1997, prior to initiation of site grading activities, Remedial Management Corporation removed three fuel USTs, one waste oil UST, a clarifier and two hydraulic hoists, and over-excavated impacted soils from an area near First Street and Beaudry Avenue.[92] Approximately 3,440 cubic yards of impacted soil were excavated from around the former locations of the USTs, pump islands, and hydraulic lifts. Impacted soils were transported under proper manifest to TPS Technologies in Adelanto, California, a facility authorized by the DTSC to accept these soils. Excavations were backfilled with gravel, uncontaminated native soil, and "certified clean" imported soil from American Remedial Technologies in Lynwood, California.[93]

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[88] Geomatrix Consultants, Inc., Errata (July 9, 2002) to *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001).

[89] County Sanitation Districts of Los Angeles County letter to LAUSD (April 27, 1999).

[90] LAUSD letter to Matt Zuro, County of Los Angeles Sanitation Districts (May 13, 1999).

[91] Los Angeles District Attorney's Office interview of Richard Lui (May 31, 2001 April 5, 2002) and Steve Croasdale (July 6, 2001).

[92] Remedial Management Corporation tank removal report to LAUSD (September 19, 1997); Geomatrix, *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001) at 32.

[93] *Id.*

In October of 1997, impacted soils were encountered during the site grading near the former intersection of Court Street and Beaudry Avenue.[94] LAUSD retained Ecology Control Industries to provide an analysis, and on October 8, 1997 the company concluded that impacted soils were limited to an area approximately 6 feet long, 6 feet wide, and 4 feet deep. A soil sample collected from the base of the excavation indicated that the sample was tested and found to be "free from detectable levels of petroleum hydrocarbons." A sample of the stockpiled soils removed from the excavation contained TPH with carbon chain rings consistent with common motor oil at a concentration of 35,000 mg/kg. The documentation and correspondence reviewed indicated that the stockpiled soils would be transported offsite to TPS Technologies for treatment and that facility was authorized by the Department of Toxic Substance Control to receive and treat those soils. The removed soil was properly manifested.[95]

Two 500-gallon diesel underground tanks and related impacted soil from the on-site area near the former intersection of Boylston and Mignonette Streets were unexpectedly discovered during site grading.[96] On October 22, 1997, El Capitan excavated and removed the tanks and the soil, which consisted of approximately 91 tons of petroleum hydrocarbon-impacted material. The soils were properly manifested and transported to Landmark Materials in Irwindale, California for treatment at a facility authorized by the DTSC to accept those soils.[97]

On January 7, 1998, approximately 1,200 cubic yards of impacted soil were removed from the planned bleacher area, near the former intersection of Colton and Boylston Streets. The crude oil-impacted soil from this excavation was properly manifested and transported to TPS Technologies for treatment.[98]

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[94] LAUSD inter-office correspondence regarding report of soil contamination near Beaudry Avenue and Court Street (October 9, 1997).

[95] Geomatrix, *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001) at 33.

[96] El Capitan *Environmental Services, Inc. Underground Storage Tank Closure Report* (November 1997).

[97] *Id.*

[98] LAUSD inter-office correspondence regarding crude oil contamination in future bleacher area (January 13, 1998).

Advanced GeoEnvironmental, Inc. prepared a report describing the clean-up of diesel impacted soil near the northwest corner of First Street and Beaudry Avenue.[99] On October 12, 1999, a truck from E-Z Mix, Inc. hit some construction debris at the site, damaged the valve on its fuel tank, and released approximately 20-50 gallons of diesel fuel. A total of 21 tons of soils were excavated under the supervision of the Department of Toxic Substances Control and properly manifested and transported to TPS Technologies.

The District Attorney's Office has concluded, based on this evidence, that there was no illegal transportation or disposal of hazardous waste.

On-site reuse of impacted soil. It has been alleged that crude oil-contaminated soils were diluted or improperly buried on the site during the grading and excavation process. We have examined these allegations and have concluded there is insufficient evidence to establish those claims.

The RWQCB advised LAUSD by letter dated April 28, 1998, that soil contaminated with naturally-occurring crude oil already present at the subject site could be excavated and replaced or reused at the Belmont site subject to testing and approval.[100] The RWQCB outlined the conditions for the soils to be reused on site providing that: soil samples were to be collected from each soil stockpile at a frequency of one sample per 1,000 cubic yards of soil; the soil samples were to be analyzed using Environmental Protection Agency (EPA) Method 8015M; and that the analytical results were to be submitted to the RWQCB for review before on-site replacement of any impacted soil. Two letters from Law/Crandall to the RWQCB dated July 24 and September 16, 1998, stated that the soils tested met the criteria listed in the RWQCB Interim Assessment Guidelines, Table 4-1.[101] Table 4-1 of the Interim Site Assessment Guidelines lists maximum soil screening levels for total petroleum hydrocarbons (TPH) (with carbon chain distributions) and benzene, toluene, ethylbenzene, and xylenes (BTEX).[102]

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[99] Advanced GeoEnvironmental Removal Report of Diesel Impacted Soil at Belmont (November 17, 1999).

[100] Regional Water Quality Control Board letter to LAUSD regarding onsite placement of naturally occurring crude oil contaminated soil (April 28, 1998).

[101] Law/Crandall letters to the Regional Water Quality Control Board (July 20, 1998 and September 16, 1998).

[102] Regional Water Quality Control Board, *Interim Site Assessment and Cleanup Guidebook* (May 1996).

In a letter to TBP dated April 20, 1998, Law/Crandall recommended that four feet of non-impacted fill be placed over the impacted fill reused on site in the planned football field area to serve as a "buffer zone."[103] This recommendation was based on a review of historical analytical data collected at the site and an evaluation of risk associated with potential exposure to impacted soils. Although the proposed reuse of impacted soils in the planned football field area "will not increase the hazard index of existing soils," Law/Crandall recommended that the relocated soils be covered with clean fill to "…ensure that any human receptors present at this area of the site will be more than adequately protected." Two letters from the RWQCB dated May 27, 1998, and July 23, 1998, permitted the on-site placement of 6,000 cubic yards and 5,000 cubic yards of impacted soil. Both letters referred to analytical data reviewed by the RWQCB and indicated that the soils were acceptable for on-site placement.[104]

In a letter dated September 16, 1998, Law/Crandall requested that RWQCB allow soil referenced in a letter dated July 24, 1998, to be placed in the football field area as well as in the Bixel Street area. In a March 3, 1999 letter to the LAUSD, Law/Crandall stated that approximately 7,000 to 8,000 cubic yards of impacted soil were placed in the Bixel Street area.[105]

Allegations have been raised that impacted soils with hydrocarbon levels in excess of maximum allowable levels for on site reuse were improperly placed as recompacted fill in "key ways" at the base of two cut slopes located on the 24-acre portion of the site. A key way or shear key is recompacted backfill installed near the toe of a slope into underlying formation to provide increased sliding resistance for slope materials along potential slip surfaces. Geomatrix drilled two soil borings at these locations, one to a depth of 20.5 feet and another to a depth of 16 feet, and collected soil samples for chemical analysis.[106] The results of these analyses are discussed in the attached Geomatrix report.

The District Attorney's Office concludes there is no evidence of improper handling of on-site impacted soil during grading and excavation. The activities were approved by the RWQCB. No

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[103] Law/Crandall letter to Temple Beaudry Partners (April 20, 1998).

[104] Regional Water Control Board letters to the LAUSD (May 27, 1998 and July 23, 1998).

[105] Law/Crandall letter to LAUSD regarding criteria for soil handling and disposal (March 3, 1999).

[106] Geomatrix, *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001) at Appendix D, Log of Boring GSB 15 and GSB 17.

evidence was found to suggest that any of the parties "covered up" relevant data pertaining to impacted soil reused on-site or that impacted soils were unlawfully "buried" on-site.

Disposal of drilling mud. A January 13, 1998 memo from Richard Lui to Roger Friermuth, both of the LAUSD, raises the possibility that a former drilling mud pit existed on the BLC site.[107] In that memo, Lui describes an area where crude oil-impacted soils were removed and disposed. Lui states that it is "suspected that the area is a former pit used to hold fluids when drilling for crude oil."[108] As the *IG Report I* asserts:

> Such wastes are explicitly defined as hazardous wastes in the 22 CCR Section 66261, Appendix X listings. This section of regulations requires that drilling fluids, drilling muds and waste oil (among others) be managed as a hazardous waste unless it is determined not to be hazardous waste pursuant to procedures set forth in 22 CCR section 66262.11 and section 66261, Appendix X.[109]

To resolve this we requested that the DTSC examine whether there was evidence of drilling fluids and drilling muds at the site. That examination was undertaken by DTSC investigators Tom Donahue and James McCarthy. Their independent review of the environmental documentation, together with a research of historical oil drilling methods (both in the Los Angeles Oil Field as well as in other locations outside of Los Angeles) led to the conclusion that hazardous material, particularly heavy metal drilling mud technology, did *not* exist at the time that the oil wells were drilled at Belmont.

Furthermore, according to Geomatrix's historical research, oil wells at and near the Belmont site were drilled during the late 1800's and early 1900's and likely were drilled using cable tool drilling methods *without* the use of drilling mud.[110]

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[107] LAUSD Internal Audit and Special Investigations Unit, *Report of Findings Belmont Learning Complex* (September 13, 1999) at Supplemental Exhibit 195.

[108] *Id.* at Exhibit 195. Interoffice Correspondence from Richard Lui to Roger Friermuth (January 13, 1998), with chemical analysis attachment.

[109] LAUSD Internal Audit and Special Investigations Unit, *Report of Findings Belmont Learning Complex* (September 13, 1999) at 148–149.

[110] Division of Oil and Gas, *Summary of Operations*, California Oil Fields (January–June 1961).

In late December of 1997 and early January 1998, on-site workers reported encountering oil-impacted soils and several concrete columns, approximately 15 inches in diameter and 20 feet deep in an area near the intersection of Colton and Boylston Streets near the planned bleacher area.[111] In its experience in working at former and existing oil production facilities, Geomatrix has not observed drilling fluid circulation pits fitting the above description.[112] Geomatrix has concluded that the reports it reviewed, including field notes and observations, do not confirm whether drilling mud pits were used at the site prior to the LAUSD acquisition.

In his interview with this Office, Richard Lui explained that as an LAUSD employee, he had no oil field management experience and had no special knowledge or understanding of drilling muds in particular.[113] Richard Lui's suspicion "that the area is a former pit used to hold fluids when drilling for crude oil," was not based on any specialized expertise or hard facts. In Law/Crandall's memorandum to Richard Lui dated January 15,1998, the company described the location as a "former crude oil pit"[114] and *not* a "former pit used to hold fluids when drilling for crude oil" as Lui had speculated.

During LAUSD's oil well abandonment program, drilling mud was used on site. Waste manifests dated November 22, 1997 indicate that drilling mud was shipped from the site to McKittrick Waste Treatment facility as non-hazardous waste.[115] Although unclear from the records reviewed, it is likely that this mud was used during November 21, 1997 abandonment of the Dividend Oil Company Well No. 1, just one day prior to the mud being shipped to McKittrick, a licensed facility to accept such materials.[116]

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[111] LAUSD inter-office correspondence regarding crude oil contamination in the future bleacher area (January 13, 1998).

[112] Geomatrix, *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001) Appendix at 29.

[113] Los Angeles District Attorney's Office interview of Richard Lui (June 2001).

[114] Law/Crandall memorandum to Ken Reizes and Richard Lui, "Re: Supplemental Geo-technical Recommendations, Backfill of Former Crude Oil Pit Near Boylston and Colton, Belmont Learning Complex" (January 15, 1998).

[115] Ecology Control Industries Non-hazardous waste manifests for drilling mud generated by LAUSD (November 22, 1997).

[116] *Id.* Also LAUSD inter-office correspondence from Richard Lui to Roger Friermuth transmitting Belmont Learning Complex oil well documents (October 26, 1998).

Other instances of off-site disposal of drilling mud likely occurred during recent oil well abandonment work at the site and the drilling of well LAUSD No. 1B. We interviewed LAUSD employee, Carlos Torres, who stated that large vacuum trucks were at the site on November 21 and 22, 1997 to remove the muds or liquids that were used to cap (abandon) the oil wells. Torres's statement is consistent with Geomatrix's findings that the use of muds at the site was recent and that the muds were used for oil well abandonment and were properly manifested and shipped to McKittrick for disposal.

Drilling mud is not considered hazardous under federal law. However, California regulations list waste drilling mud as "presumed hazardous" due to its toxicity. The regulations also state that a waste may be determined non-hazardous by testing or by knowledge of the waste materials and the processes that generated them (22 CCR 66261, Appendix X(b)). McKittrick personnel have indicated that the company receives shipments of drilling mud characterized as both hazardous and non-hazardous. Drilling muds classified as hazardous are typically hazardous due to metals concentrations. Documents reviewed did not indicate whether the drilling mud shipped from the Belmont Learning Complex to McKittrick on November 22, 1997 was tested for metals or other chemicals of potential concern. Additionally, there is no evidence to suggest that the persons who inspected the mud before it left the site would have had any reason to suspect that it was hazardous.

In order to support a felony prosecution, the evidence must establish that the November 22, 1997, shipment consisted of a hazardous waste which had been improperly disposed of at an unlicensed facility. The evidence fails to establish such circumstances. The McKittrick Waste Treatment Facility is licensed to receive hazardous drilling muds. Even assuming *arguendo* that the shipment was a hazardous waste, it was disposed of properly at a licensed and certified disposal and treatment facility.

F. Tank Abandonment

As a result of on-going litigation between LAUSD and El Capitan Environmental Services (El Capitan), questions have persisted surrounding the propriety of El Capitan's removal of two underground storage tanks (USTs) unexpectedly found on the Belmont site. Accordingly, the District Attorney's Office has revisited the issue of whether El Capitan committed any environmental criminal offenses in its handling of the subject tanks.

Facts concerning the removal of USTs. During grading operations, workers at BLC unexpectedly discovered two partially-filled five-hundred gallon USTs. El Capitan, an environmental remediation firm specializing in USTs, removed the tank contents, the tanks and

attached piping, and approximately 91 tons of impacted soil from beneath the tanks. The tank contents and the water used to rinse the tanks prior to disposal were treated as hazardous waste, but the soil from beneath the leaking tanks was not. It has been suggested that under these circumstances, the soil was required to be classified as hazardous waste, and that El Capitan violated state and perhaps federal law in disposing of the soil at a facility that was not permitted to receive hazardous waste.

We have investigated these allegations to determine whether the soil in question was a hazardous waste. In order to maintain a prosecution for a felony violation of the Hazardous Waste Control Law (HWCL),[117] the evidence must establish that the soil actually contained hazardous substances in sufficient concentrations to come within the definition of a hazardous waste. We find no such evidence.

The two five-hundred gallon USTs in question were approximately three feet by eight feet in size, and found buried on Parcel 47, Lots 3 and 5 near what had formerly been the intersection of Boylston and Mignonette streets. Unlike other USTs on the BLC site, the existence of these two tanks were unknown to LAUSD and the project developer and contractor prior grading activities.[118] Residences had formerly been situated on Lots 3 and 5 but had been removed by Shimizu during its development effort.[119] Shimizu later sold those cleared lots containing the buried tanks as part of the 24-acre parcel to the LAUSD. Geomatrix's study of the history of the area noted that residential development began in 1894 and covered most of the 35 acres.[120] Los Angeles Department of Building and Safety records indicate that lots 3 and 5 had residential structures on them at least as early as 1912. In fact, the area was zoned for residential use only. USTs on residential lots typically store fuel for home heating systems that run on petroleum distillates or diesel fuel.[121]

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[117] Health and Safety Code section 25189.5.

[118] Five large commercial USTs were removed by a different removal firm (Remedial Management Corporation) from locations at Beaudry Avenue and First Street during the grading operations. These tanks included one 6,000 gallon UST, two 4,000 gallon USTs, and one 1,000 gallon waste oil (used oil) UST.

[119] Map Book 17-143: Boylston Heights Track. Lots 3 and 5 were in a residential area known as Boylston Heights. Lot 3 was formally 124 North Boylson Street. Lot 5 was formally 1150 Mignonette Street. This area was located on a hill about sixty vertical feet upgrade from the intersection of First Street and Beaudry Avenue that was 300 feet away to the southeast.

[120] Historical photographs from 1979 show the majority of the 35 acres covered by residential homes, including the intersection of Boylston and Magnonette Streets.

[121] The Department of Energy reports that 7.7 million households in the U.S. use home heating oil to heat their homes today. *See* "The Northeast Home Heating Oil Reserve" at *www.fe.doe.gov.heatingoil/*.

In addition to the predominantly residential character of the neighborhood, there had been a commercial strip located along the intersection of First Street and Beaudry Avenue. Two businesses, George's Body Shop and Avila Upholstery, among others, occupied this commercial area. Historical plot maps from the Los Angeles Department of Building and Safety establish that George's Body Shop and Avila Upholstery were approximately 300 feet away and 60 vertical feet downhill from lots 3 and 5.[122] (*See* map showing George's Body Shop and Avila Upholstery, below.)

LAUSD hired El Capitan to remove the tanks, the tank contents, and any affected soil. While no cracks or leaks were visible to the naked eye, the USTs had in fact leaked over time and impacted the surrounding soil. The contract price for this work was to be $5,465.[123] Due to the residential character of the neighborhood, the diesel odor of the contents, the small tank size that was inconsistent with commercial uses, and the lack of any surface piping, El Capitan reasoned the USTs were home heating oil tanks containing diesel fuel.[124]

On October 13, 1997, LAUSD had instructed one of its environmental contractors, Ecology Control Industries (ECI), to sample the contents of the two USTs for analysis. ECI analyzed the contents for metals, mercury, and petroleum hydrocarbons, and concluded in a report to the LAUSD on October 21, 1997, that the USTs contained only diesel fuel residues. The contents did not contain any components to suggest the presence of anything other than diesel fuel.[125] LAUSD faxed this report to El Capitan on October 21, 1997.

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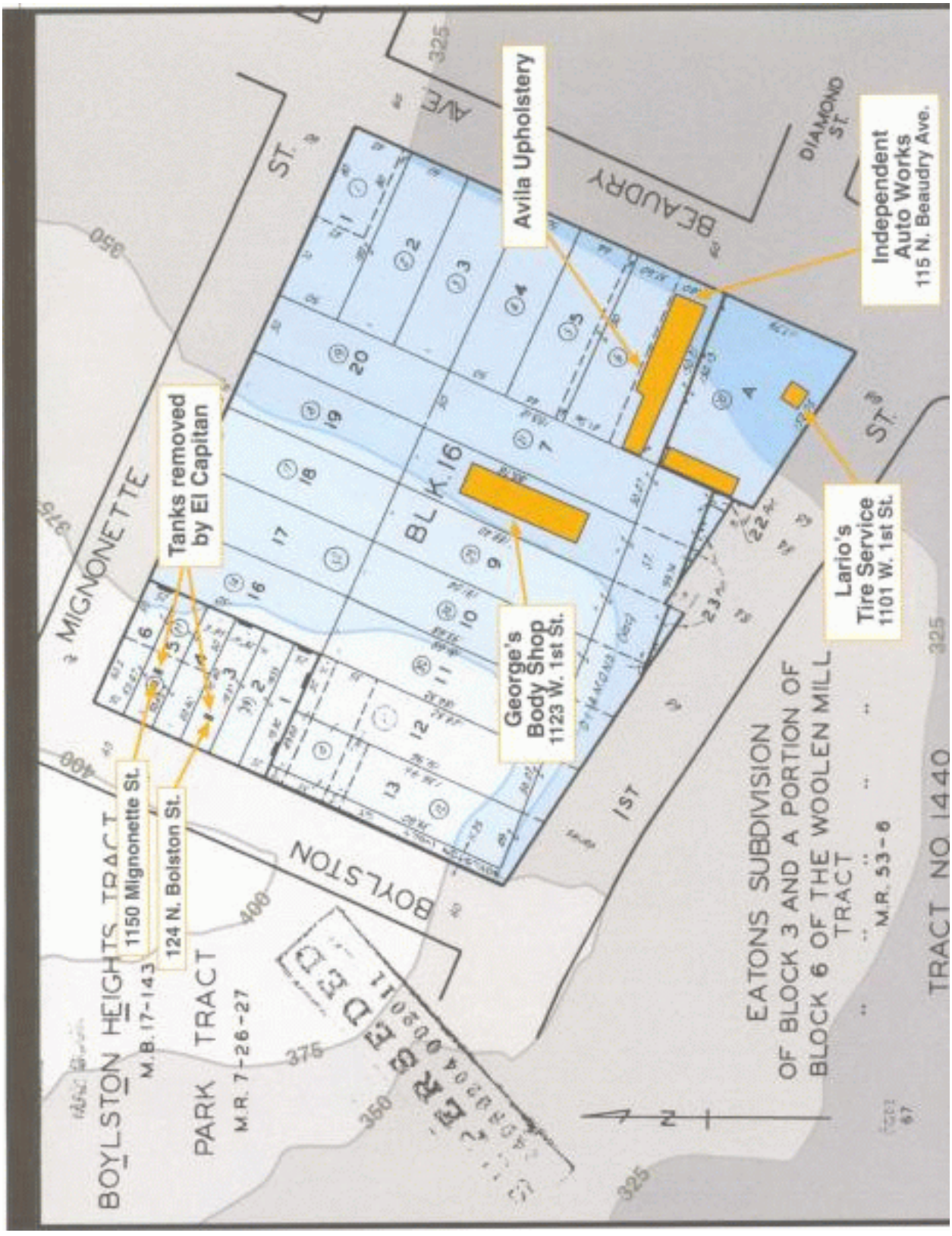
[122] Residential lots 3 and 5 are not directly connected to the commercial area at Beaudry Avenue and First Street. To arrive at lots 3 and 5 from Georges Body Shop or Avila Upholstery via the public streets, one must travel westbound on First Street turning northbound at Boylston Street until reaching Mignonette Street. The distance is approximately a quarter of a mile.

[123] El Capitan "Quotation to Remove Two Underground Storage Tanks from the Belmont Site" (October 14, 1997).

[124] Los Angeles District Attorney's Office Interview of Richard Lui, former Safety Officer with the LAUSD's Environmental Health and Safety Branch (August 16, 2002). *See* Los Angeles District Attorney's Office Interview of Harry Boyajian and Al Maurad, owners of El Capitan (October 29, 1999). *See* El Capitan "Underground Storage Tank Closure Report, Belmont Learning Complex" (November 1997). Los Angeles City Fire Department Inspector, Dean Stivason informed the District Attorney's Office that small home heating oil USTs (500-gallon) have been discovered under old homes during grading at the Staples Center and new Catholic Cathedral in the downtown area of Los Angles.

[125] *See* Ecology Control Industries chemical analytical results, faxed to El Capitan Environmental Services, Inc. (October 21, 1997).


Avila Upholstery
Independent Auto Works
115 N. Beaudry Ave.
Tanks removed by El Capitan
George's Body Shop
1123 W. 1st St.
Lario's Tire Service
1101 W. 1st St.
1150 Mignonette St.
124 N. Bolston St.
BOYLSTON HEIGHTS TRACT
M.B. 17-143
PARK TRACT
M.R. 7-26-27
EATONS SUBDIVISION OF BLOCK 3 AND A PORTION OF BLOCK 6 OF THE WOOLEN MILL TRACT
M.R. 53-6
TRACT NO 1440
BLK 16
MIGNONETTE
BOYLSTON
BEAUDRY
DIAMOND ST.
1ST
AVE
ST.
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In preparation for its removal work, El Capitan secured the necessary permits from the Underground Tanks Enforcement Unit of the Los Angeles City Fire Department,[126] the government agency certified to oversee and monitor the removal and disposal of underground storage tanks.

On October 22, 1997, El Capitan removed the two USTs under the direct supervision of Los Angeles City Fire Department Inspector Dean Stivason. The liquid residue found within the tanks was pumped out and the tank interiors were cleaned with pressurized water by Nieto & Sons Trucking, Inc., an El Capitan subcontractor. The Lower Explosive Limit of the residues were measured during the cleaning by a certified industrial hygienist and found to be 0%. The cleaned tanks were then taken to A-1 Scrap Company for recycling. The tank contents and "rinseate" from the cleaning process were manifested and disposed of as "non-RCRA hazardous waste" at Demenno Kerdoon, a facility in Compton which is permitted to receive such wastes.[127]

The soils under and around the tanks were sampled at the direction of Inspector Stivason. Those soil samples would be later analyzed by American Analytics for benzene, toluene, ethyl benzene, and xylene (BTEX) and total petroleum hydrocarbons (TPH). El Capitan then removed a total of 91.32 tons of impacted soil from under and around the tank area and stored the soil nearby on the site pending the results of the analytic testing. Inspector Stivason then directed that seven soil samples be taken from the bottoms and walls of the excavated areas.

American Analytics performed chemical analyses of those samples, and returned the completed analyses to El Capitan on October 31, 1997. The detected total petroleum hydrocarbons (diesel) (TPHd) concentration in the soil around the invert at one of the tanks was 38 mg/kg and the concentration in the soil around the invert for the other was 3,000 mg/kg. The 38 mg/kg tank invert soils contained ethyl benzene at a concentration of .0085 mg/kg and xylenes at .066 mg/kg, and had no benzene or toluene. The 3,000 mg/kg soils did not contain any detectable concentrations of BTEX. Lead concentrations in the soils were at or below native soil conditions in California.

Of the seven samples taken from the walls and bottoms of the excavations, no sample contained any detectable concentrations of the contaminants TPH or BTEX, which conceivably could have been a kind of hazardous waste.

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[126] Pursuant to Health and Safety Code section 25283.

[127] Manifest documents indicate 750 gallons of liquid. This figure included the cleaning water, called rinseate, that was used to clean the empty USTs after the contents were pumped out.

El Capitan then retained West Coast Sand and Gravel on October 31, 1997 to transport the 91.32 tons of diesel impacted soil to Landmark Materials, Inc. in Irwindale, California for disposal.[128] The manifest was signed by the LAUSD Environmental Health and Safety Branch representative Richard Lui and designated the LAUSD as the generator of the waste. The non-hazardous manifest identified the waste as "non-regulated petroleum contaminated soil."

The soils were not specifically tested to detect for chlorinated solvents, polychlorinated biphenyls (PCBs),[129] paint thinners, and compounds such as acetone prior to their disposal at the Landmark facility. The *IG Report I* issued two years later in September 1999 found fault with the failure to test for the above. The *IG Report I* notes that according to the 1988 McLaren Environmental Report, various paint containers were lying on the ground at George's Body Shop, and as per the property manager, paint thinners and adhesives were stored and used at Avila Upholstery. The *IG Report I* states that "both facilities were located on the subject property."[130] The *IG Report I* further asserts that because no testing was conducted for waste solvents, paint thinners, chlorinated solvents, acetones, or polychlorinated biphenyls (PCBs) *before* the removal and disposal of those soils, the soils were required to be classified and managed as a hazardous waste under the requirements of 22 California Code of Regulations sections 66262.11 and 66261.3.[131]

El Capitan disputed *IG Report I*'s conclusion of wrongdoing and immediately responded with information contradicting its legal and factual assertions. Ultimately, El Capitan filed an administrative claim against LAUSD for damages based on defamation. During the pendency of that claim, the LAUSD retained various experts and ultimately adopted the position that the fuel that leaked from the tanks became "used oil" when it mixed with the soil. LAUSD contended that the fuel-impacted soil was *presumed* to be hazardous waste unless more comprehensive testing than was done by El Capitan established that it was not.

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[128] The amount of impacted soil exceeded the contract amount in the El Capitan/LAUSD agreement. El Capitan billed the LAUSD $6,088 for transporting the impacted soil to Landmark Materials, Inc. The LAUSD refused to pay the bill. On March 11, 2002, the LAUSD entered into a settlement with El Capitan ending all El Capitan claims against the LAUSD for unpaid bills and allegedly defamatory statements made in the *Report of Findings*.

[129] PCBs is an acronym for polychlorinated biphenyls. These chemical compounds were manufactured in the United States between 1929 and 1977. PCBs are classified as hazardous waste. Resistant to heat, PCBs were principally used as insulating fluid in electrical transformers and capacitors. Secondary uses were in "lubricating and cutting oils and wax extenders, and as plasticizers in paints, flame-retardants, plastics and other compounds." *See* the California Office of Environmental Health Hazard Assessment PCB Fact Sheet.

[130] LAUSD Internal Audit and Special Investigations Unit, *Report of Findings Belmont Learning Complex* (September 13, 1999) at 148.

[131] *Id.*

Significantly, in the spring to 2002, El Capitan's defamation claim was settled, with LAUSD issuing a "To Whom It May Concern" retraction letter and agreeing to pay El Capitan's outstanding bill of $5,465 for its removal services, as well as an additional $20,000 sum to settle the lawsuit.

The District Attorney's Office has examined whether El Capitan committed any violations of the HWCL or any other felonies during the removal and disposal of the USTs, the tank contents, and the surrounding impacted soil. This Office concludes there were no violations of law.

Proper testing. Title 22 CCR 66262.11 requires the "generator" to identify the nature of the waste and evaluate whether it is a hazardous waste by making the following judgments:

1. The waste is an excluded waste (under California law);

2. The waste is listed under RCRA[132] (under federal law);

3. The waste is a California-only listed waste;[133] and,

4. The waste exhibits one of the four characteristics of hazardous waste (corrosivity, reactivity, ignitability, and toxicity).

The original tank contents and rinseate pumped from the tanks was considered to be hazardous waste because it was diesel fuel mixed with water. Pursuant to 22 CCR, Div. 4.5, Chap. 11, Appendix X (a), the fuel/water mixture is presumed under the Hazardous Waste Control Law (HWCL) to be non-RCRA hazardous waste (California-only hazardous waste). In addition, diesel fuel is ignitable and thus possesses one of the four characteristics of hazardous waste. LAUSD and El Capitan, therefore, properly manifested the 750 gallons of liquid as non-RCRA hazardous waste. The waste was then disposed of at Demmeno/Kerdoon, a facility licensed to process hazardous waste. However, the substantive issue presented for our consideration is whether the impacted soil under the USTs also should have been presumed to be hazardous waste. The *IG Report I* asserted

[132] The Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901 *et seq.*).

[133] Referred to as a non-RCRA hazardous waste.

that impacted soil under the USTs should have been presumed hazardous because the liquid waste was presumed hazardous.[134]

But HWCL requires that each waste be analyzed separately under 22 CCR 66262.11. The addition of water to the tanks during cleaning did not change the nature of the soil beneath the tanks. The impacted soil was tested by El Capitan on October 22, 1997, as directed by the Los Angeles City Fire Department. The analysis found that the soil contained 3,000 mg/kg of total petroleum hydrocarbons (diesel). Under the 22 CCR 66262.11 analysis, the diesel impacted soil was:

1. Not an excluded waste under California law (22 CCR 66261.2 and Health and Safety Code section 25143.2);

2. Not listed by RCRA as a hazardous waste (22 CCR 66261.30–66261.35);

3. Not a California-only (non-RCRA) hazardous waste (22 CCR, Div. 4.5, Chap. 11, Appendix X, (a)); and

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[134] Later, during the pendency of El Capitan's administrative defamation claim the LAUSD would take the position that the impacted soil was contaminated by "used oil." If true, the impacted soil would have been presumptively hazardous. The basis of this position is that unused diesel fuel, leaking out of a UST into the native soil, became "used oil" when it contacted the soil.

Health and Safety Code section 25250.1 defines "used oil" as:

> ". . . any oil that has been refined from crude oil, or any synthetic oil, that has been used, *and* as a result of use or as a consequence of extended storage, or spillage, has been contaminated with physical or chemical impurities. Examples of used oil are spent lubricating fluids that have been removed from an engine crankcase, transmission, gearbox, or differential of an automobile, bus, truck, vessel, plane, heavy equipment, or machinery powered by an internal combustion engine; industrial oils, including compressor, turbine, and bearing oil; hydraulic oil; metal-working oil; refrigeration oil; and railroad drainings." (Emphasis added).

The first requirement of the law is that the oil be *used*, meaning that an oil or fluid has been processed in a machine, motor or other mechanical device. The obvious purpose of regulating the disposal of such used oil relates to the heavy metal traces and other materials it would have acquired from use in machinery. By definition, the diesel fuel in the USTs was unused because it was never burned. The concept of used fuel oil is meaningless since fuel oil would necessarily be consumed during combustion. Not surprisingly, under California law as interpreted by the Department of Toxic Substances Control, *diesel, kerosene and gasoline and other fuels are not included in this category, they are not used oils.* See California Department of Toxic Substances Control (DTSC) "Fact Sheet: Used Oil and Oil Filter Management." (April 2001).

4. Not a hazardous waste because it did not exhibit any characteristics of corrosivity, reactivity, ignitability, or toxicity (22 CCR 66261–66261.24).[135]

The law requires that the generator must either test the waste or apply his knowledge of the waste's characteristics and history. *El Capitan satisfied both standards.*

First, the diesel impacted soil was tested by American Analytics, as directed by the Los Angeles City Fire Department.[136] That analysis showed the soil had low levels of diesel TPHs. All other contaminates were either nonexistent or well under prohibited levels. The impacted soil was not corrosive, reactive, ignitable or toxic as defined under California's HWCL.

Second, LAUSD and El Capitan had knowledge that the tanks were found in what had been a former residential neighborhood and likely had been used to store home heating fuel. American Analytics confirmed this. The *IG Report I* was mistaken in placing the potential generators of hazardous wastes, such as George's Body Shop and Avila Upholstery, on the properties where the USTs were found. Plot maps demonstrate that George's Body Shop and Avila Upholstery are in different neighborhoods, nearly 300 feet away from lots 3 and 5. Topographic maps record a significant uphill slope of about vertical 60 feet from the industrial strip at First Street and Beaudry Avenue to the USTs. Site topography undercuts any theory that the auto repair shops disposed of wastes into drains that flowed into the USTs on lots 3 and 5. No electrical transformers or capacitors, the most likely source of polychlorinated biphenyl (PCB) contamination, were found buried with the USTs or anywhere on the Belmont site. There were no signs of industrial wastes, solvents, or used oil (wastes that possibly might contain PCBs) in this former residential neighborhood.

Finally and significantly, El Capitan did not manifest the 91.32 tons of impacted soil as clean, uncontaminated soil, but rather as "non-regulated petroleum-contaminated soil" and sent it to an appropriate facility, Landmark Materials, Inc. In addition, each stage of El Capitan's work was

[135] 3,000 mg/kg of TPH is a trace amount of diesel. It is not ignitable.

[136] The Ecology Control Industries earlier analysis also factored into this analysis.

supervised and approved by the Los Angeles City Fire Department inspectors who were on site and actively involved in the USTs removal process.[137]

Conclusion. The District Attorney's Office concludes that El Capitan's handling of the 91.32 tons of impacted soil was in conformity with California's Hazardous Waste Control Law. There is no evidence to suggest that the 91.32 tons of soil in issue here contained hazardous waste, and no evidence to support a prosecution for either transportation or disposal of hazardous waste at an unpermitted facility pursuant to the provisions of Health and Safety Code section 25189.5.

G. Oil Well Abandonment

The District Attorney's Office has examined whether there were any violations of criminal law arising out of the abandonment of the old oil wells situated on the BLC site. We conclude there were none.

LAUSD was responsible for locating and abandoning or re-abandoning old oil wells on the BLC site.[138] To assist in this task, LAUSD retained Intera, Inc., a nationally-known environmental engineering and remediation firm, to search out the old wells and plan their abandonment.[139] Grayson Services, Inc., another engineering contractor performed the actual drilling and abandonment work. Pursuant to statute, the California Division of Oil and Gas oversaw these efforts by inspecting and certifying that the old oil wells were properly abandoned and made safe.[140]

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[137] After the *IG Report I* was issued on September 13, 1999, the Los Angeles City Fire Department revisited El Capitan's removal of the USTs. Included in the review were five large USTs removed by other companies from the commercial area at First Street and Beaudry. In a letter to the Los Angeles City Attorney's Office, dated November 22, 1999, Fire Marshall Jimmy H. Hill noted the Los Angeles City Fire Department was the local agency responsible for underground storage tank permitting, inspection and removal. Based on the current state of the evidence, Fire Marshall Hill wrote, there was no intention to refer the El Capitan matter, or any other Belmont UST removal matter, to the Los Angeles City Attorney for misdemeanor prosecution.

[138] Final Environmental Impact Report for the Belmont Learning Complex (October 1996).

[139] Intera, Inc. later became Duke Engineering & Services.

[140] District Deputy Richard Baker is the head of the southern California office (District 1) of the Division of Oil and Gas. Mr. Baker has held this position since 1989 and has worked directly with the LAUSD from the early planning stages of the Belmont Learning Complex.

Allegations have previously been raised in the *IG Report I* that Intera, Inc. knowingly misrepresenting the environmental conditions at BLC to the Division of Oil and Gas by deleting a paragraph from their January 1997 report *Investigating Alternatives for LAUSD #1A Well*. That deleted paragraph recommended a separate methane relief well be drilled in addition to a planned replacement oil well. It was further suggested that the LAUSD #1B replacement well did not relieve oil field pressure and as such was a failed replacement well.

The argument is that if all the information had been provided, the Division of Oil and Gas would not have approved the abandonment of the LAUSD #1A oil well (commonly known as the Suplin well) without also requiring an alternate methane pressure relief well. As a result of the alleged deception, the Suplin well, an active well that vented methane gas, was allowed to be abandoned. The Suplin well abandonment had adverse environmental consequences because its replacement well allegedly failed and the methane problem was exacerbated since no effective alternative methane relief well was provided.

Analysis. In examining these issues for possible criminal violations, the District Attorney's Office has consulted with California Division of Oil and Gas District Deputy Richard Baker and Deputy California Attorney General Alan Hager regarding the regulatory authority of the Division of Oil and Gas and the statutory duties and obligations of oil well operators. We also reviewed the voluminous Division of Oil and Gas BLC file, relevant documents from LAUSD, Intera and Grayson Services, Inc., and interviewed all relevant LAUSD and Division of Oil and Gas personnel.

California Public Resources Code, section 3000 *et seq.* provides that the Division of Oil and Gas has statutory authority over oil and gas operations including oil well drilling and oil well abandonment in the state of California.[141] Section 3236 makes it a misdemeanor for oil well operators to hinder or delay the Division of Oil and Gas in enforcing any provision of the laws regulating oil and gas well found in Public Resources Code section 3000 *et seq.*[142] The Public

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[141] Los Angeles District Attorney's Office interviews of Richard Baker, District Deputy Division of Oil and Gas (June 5, 2001 and May 30, 2002). *See also* California Attorney General Memorandum from Deputy Attorney General Alan Hager to Richard K. Baker, District Deputy, Division of Oil and Gas "Building in an Old Field, Role of the Division of Oil and Gas and Geothermal Resources" (March 23, 1999).

[142] Section 3236 provides:

> "Any owner or operator, or employee thereof, who refuses to permit the supervisor or the district deputy, or his inspector, to inspect a well, or who willfully hinders or delays the enforcement of the provisions of this chapter, and every person, whether as principal, agent, servant, employee, or otherwise, who violates, fails, neglects, or refuses to comply with any of the provisions of this

Resources Code, section 3236, prohibits well operators from filling a false or fraudulent reports with the Division of Oil and Gas. Oil well operators are required by statute to file various reports with the Division of Oil and Gas including oil well inspection reports, oil well abandonment reports, and history of oil and gas well reports in oil well drilling operations.

According to Deputy Richard Baker of the Division of Oil and Gas, the Division of Oil and Gas does *not* have statutory authority to *prohibit* developers from building over abandoned wells, or to order that new wells to be drilled to prevent re-pressurization once producing wells are lawfully abandoned. District Deputy Baker has advised that the Public Resources Code gives the Division of Oil and Gas only *advisory* authority in development projects. Thus, while the Division may make recommendations to developers on whether and where to build in an old oil field, the developers' failure to follow those recommendations is not a subject for the criminal law.

According to Geomatrix's review of Division of Oil and Gas correspondence related to the Belmont site, 13 abandoned wells were present on the 11-acre site north of Colton Street.[143] One of those wells, the Suplin well,[144] was an active producer of about 5–10 barrels of oil per day.[145] The Division of Oil and Gas recommended that the Suplin well be maintained to prevent the oil field from repressurizing.[146] The Division of Oil and Gas was concerned that if the field repressurized,

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chapter, or who fails or neglects or refuses to furnish any report or records which may be required pursuant to the provisions of this chapter, or who willfully renders a false or fraudulent report, is guilty of a misdemeanor, punishable by a fine of not less than one hundred dollars ($100), nor more than one thousand dollars ($1,000), or by imprisonment for not exceeding six months, or by both such fine and imprisonment, for each such offense."

[143] Geomatrix, *Evaluation of Existing Environmental Conditions, Belmont Learning Complex* (August 2001) at 27.

[144] The Suplin Well is also known as LAUSD #1A.

[145] Intera, Inc., *Investigation of Alternatives for Relocating of LAUSD #1A Well* (January 1997). Intera noted that the Suplin Well was "over 77 years old, currently produces 5–10 barrels of oil per day and 45–50 barrels of water per day using a convention rod pump."

[146] Letter from District Deputy Richard Baker, Division of Oil and Gas, to Senior Safety Officer Rosanne McGlohon, LAUSD (August 2, 1993). *Also see* Los Angeles District Attorney's Office interviews of District Deputy Richard Baker, Division of Oil and Gas (June 5, 2001 and May 30, 2002).

oil could seep to the surface.[147] LAUSD agreed to follow the recommendation of the Division of Oil and Gas that the Suplin well be maintained as a producing well.[148]

The BLC design called for locating most of the building structures on the southeast portion of the site, generally away from the old oil wells north of Colton Street and near Toluca Avenue.[149] That design also placed the athletic fields on the 11-acre site north of Colton Street. The Suplin well was situated on the 11-acre site, located at approximately second base on the proposed new baseball field.

LAUSD requested that Intera investigate whether the Suplin well could be safely abandoned. After a geological study of the site, Intera, Inc. concluded that the Suplin well had little effect on the oil field's pressure and could be safely abandoned.[150] The Division of Oil and Gas disagreed, and continued to recommend that the Suplin well be maintained as an active producer.[151] In response, the LAUSD requested that Intera investigate alternatives to maintaining the Suplin well in its current location. Intera prepared a report for the LAUSD proposing that the Suplin well be relocated below grade (underground) on its current site or redrilled (slant drilled) from a location off the baseball field in order to relieve the pressure.[152] Based on Intera's advise, LAUSD believed that a new slant drilled well, tapping into the same oil reservoir, addressed the concerns of the Division of Oil and Gas, and was the best and safest choice to prevent oil field re-pressurization.[153]

Richard Baker agreed with Intera's recommendation that a new slant drilled well would be satisfactory, and gave his approval.[154] The Division of Oil and Gas issued permits to abandon the

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[147] *Id*.

[148] Final Environmental Impact Report for the Belmont Learning Complex (1996).

[149] Los Angeles District Attorney's Office interview of District Deputy Richard Baker, Division of Oil and Gas (May 30, 2002). *See also* LAUSD Office of Internal Audit interview of Richard Baker (May 4, 1999).

[150] Intera, Inc. letter (and attached report) to the Division of Oil and Gas (October 2, 1996).

[151] Los Angeles District Attorney's Office interview of District Deputy Richard Baker, Division of Oil and Gas (May 30, 2002).

[152] Intera, Inc., *Investigation of Alternatives for Relocation of LAUSD 1#A Well Belmont Learning Complex (11 Acre Portion)* (January 1997).

[153] Intera, Inc. letter (and attached report *Investigation of Alternatives of LAUSD 1#1A*) to the Division of Oil and Gas (February 4, 1997).

[154] Los Angeles District Attorney's Office interview of District Deputy Richard Baker, Division of Oil and Gas (May 30, 2002). *See also* LAUSD Office of Internal Audit Interview of Richard Barker (May 4, 1999).

Suplin well and drill the new replacement well. This well, designated LAUSD #1B, was drilled 300 feet to northeast, near the corner of Temple Street and Beaudry Avenue.[155] Grayson Services, Inc. abandoned the Suplin well and drilled the new LAUSD #1B. The Division of Oil and Gas inspected and approved the work.[156] The new replacement well actively pumped oil and water at the same rates as the Suplin well for a period of several months.[157]

The cost of installing a permanent production facility for LAUSD #1B was estimated at $100,000. Citing the negligible pressure in the field, LAUSD requested that LAUSD #1B be maintained as a monitoring well, rather than a production well.[158] The Division of Oil and Gas approved this change on the condition that the LAUSD #1B well pressure would be monitored on a weekly basis and that if the field repressurized, LAUSD #1B would be returned to production within 30 days.[159] LAUSD agreed to these conditions and has tested the well pressure weekly to date. District Deputy Baker of the Division informed the District Attorney's Office on May 30, 2002 that the LAUSD was in full compliance with all Division requirements. Baker reported that the pressure readings from LAUSD #1B were so low that the requirement for weekly monitoring should be relaxed.

The Division of Oil and Gas has concluded that LAUSD #1B and the Suplin well penetrated the same oil reservoir. LAUSD #1B produced the same small quantities of oil and water as the Suplin well for several months. Weekly pressure tests from the LAUSD #1B, beginning on October 6, 1998, demonstrated that the field had not re-pressurized. In fact, pressure was so low as to be negligible. The weekly pressure tests are public information, maintained by LAUSD and on file with the Division of Oil and Gas. Should the field ever re-pressurize, LAUSD #1B would be activated within 30 days. The Division's records indicate that LAUSD #1B was an active well used to monitor the pressure in the field on a weekly basis.

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[155] The Division of Oil and Gas issued the Permit, No. P 197-0991, to drill LAUSD #1B, on September 26, 1997. LAUSD #1B was drilled just past the center field line on the northeast boundary of the Belmont Learning Complex.

[156] Division of Oil and Gas History of Oil or Gas Well, Suplin Well and LAUSD #1B. *See also* Division of Oil and Gas Plan Review, Belmont Learning Complex (May 7, 1999).

[157] *Id. See also* Los Angeles District Attorney's Office interview of District Deputy Richard Baker, Division of Oil and Gas.

[158] LAUSD letter (and Duke Engineering & Services Report) to Division of Oil and Gas (July 2, 1999).

[159] Division of Oil and Gas letter to the LAUSD (September 3, 1998).

In the end, the Division maintains that LAUSD #1B was not a failed replacement well, but a successful effort to address the Division of Oil and Gas recommendation for preventing oil field re-pressurization.

Conclusion. The Division of Oil and Gas has no statutory authority to order the drilling of a replacement oil well to relieve field re-pressurization concerns or to order the drilling of a methane pressure relief well to address other environmental concerns relating to methane gas. In addition, the Division could not condition its approval of the abandonment of an active well, such as the Suplin well, on the drilling of either of the above described replacement wells. The Division of Oil and Gas had merely an advisory role in the operator's decision to abandon an existing well or drill a new well.

The Division's concern was possible oil field re-pressurization once the Suplin well was removed, and *not* methane gas. For that reason the Division recommended that a replacement oil well be drilled. While not statutorily required to do so, LAUSD voluntarily followed the recommendation of the Division and drilled the replacement well (LAUSD #1B). Intera's report investigating the replacement well alternatives was likewise not required by statute. The report's omission (by way of deletion) of a recommendation for a methane pressure relief well to address other concerns apart from field re-pressurization does not indicate wrongdoing, and does not give rise to any criminal violations.

As further corroboration of this finding, District Deputy Baker more recently informed this Office that he was aware of the allegations against Intera concerning deletion of the methane relief well paragraph. Mr. Baker told us that the Division was, in fact, in possession of the Intera *draft* containing the later-omitted methane relief well provision and provided us a copy. Mr. Baker stated that the deleted paragraph had no impact on his recommendation to LAUSD. He said there was a need for a replacement oil well, not for a methane gas relief well. Mr. Baker reported that the LAUSD fully complied with his recommendations when LAUSD #1B was drilled and maintained as a monitoring well.

Finally, even if the claim that LAUSD #1B failed to relieve oil field pressure were correct, no crime would be committed. Steps taken by LAUSD and Intera, Inc. To implement the Division of Oil and Gas's recommendations was voluntary. Failure to drill a replacement well or failure to maintain that replacement well as an active producer would not be in violation of any known California criminal statute.

H. Other Non-Felony Environmental Statutes Potentially Applicable

The following statutes are among those which have been raised in discussions of potential unlawful conduct related to Belmont environmental issues. After careful analysis, we conclude they do not apply. Further, even assuming these theories were applicable, the evidence fails to support any law enforcement action.

Education Code. Education Code section 17213 (the School Facilities Act) imposes requirements on school boards involved in school site acquisition. These requirements were applicable to the LAUSD's acquisition of the 24-acre parcel of the Belmont site. The separate 11-acre acquisition was not subject to this code section because that acquisition occurred prior to the January 1, 1991 enactment of the School Facilities Act.

Section 17213 provides in pertinent part that:

> The governing board of a school district shall not approve a project involving the acquisition of a schoolsite by a school district unless all of the following occur:
>
> (a) The lead agency, as defined in section 21067 of the Public Resources Code, determines that the *property* purchased or to be built upon is *not any of the following*:
>
> (1) The site of a *current or former hazardous waste disposal* site or solid waste disposal site *unless*, if the site was a former solid waste disposal site, the governing board of the school district concludes that the *wastes* have been *removed*....
>
> (3) A site which contains one or more *pipelines*, situated underground or above ground, *which carries hazardous substances, acutely hazardous materials, or hazardous wastes, unless* the pipeline is a natural gas pipeline which is used *only to supply natural gas to that school or the neighborhood.*

(Emphasis added.)

The District Attorney's Office has found no evidence to establish that either of the parcels were at any time determined to be hazardous waste disposal sites or solid waste disposal sites. Additionally, since there were no natural gas pipelines at the site, there is no evidence to establish that any such pipelines carried hazardous substances, acutely hazardous materials, or hazardous wastes.

Section 17213 is not a penal statute. Rather it is a civil statute that guides school boards and districts in the selection and acquisition of school sites. As a result, this section contains no criminal sanctions. Therefore, even assuming for the sake of argument that BLC were determined to be a hazardous waste disposal site, there is no legal basis under section 17213 to support criminal prosecution. Finally, the state Legislature designed this section to apply to Super Fund sites and Belmont was not such a site.

Public Resources Code. Public Resources Code section 21151.8 (The California Environmental Quality Act) contains language similar to that found in Education Code section 17213. Section 21151.8 provides in pertinent part that:

> *No environmental impact report or negative declaration* shall be approved for any project involving the purchase of a schoolsite or the construction of a new elementary or secondary school by a school district *unless* all of the following occur:
>
> > The environmental impact report or negative declaration includes *information* which is *needed* to determine if the property proposed to be purchased, or to be constructed upon, is any of the following:
> >
> > The site of a *current or former hazardous waste disposal site or solid waste disposal site* and, if so, whether the wastes have been *removed*…

The legislative history of Public Resources Code section 21151.8 mirrors the legislative history of Education Code section 17213. Both sections were added by Senate Bill 2262. Section 21151.8 is part of the California Environmental Quality Act. Like the School Facilities Act, CEQA was intended to provide Californians with a high quality environment. The CEQA process requires public notice, public hearings and a vote of approval by the lead public agency. In the case of Belmont, that lead agency was the LAUSD Board.

Applying these standards to Belmont, it is clear that public notices were sent out, public hearings were convened, and that the Board voted to approve the Final EIR, the acquisition of the site, and the construction of the BLC. Moreover, for the sake of argument, even if there had been noncompliance with the statutory process, as with Education Code section 17213, Public Resources Code section 21151.8 does not provide criminal sanctions for such noncompliance. Accordingly, these laws would not support a prosecution by our Office.

I. Conflicts of Interest in Award of Environmental Contracts

The District Attorney's Office has considered whether conflict of interest violations occurred in the award by the LAUSD of environmental testing contracts during the construction of BLC. (*See generally* Chapter 6, section E.)

The focus of this inquiry concerns Angelo Bellomo, the current LAUSD Environmental Health and Safety Director, who has held that position since January 1, 2001. Previously, he was in private practice as an environmental consultant, from approximately 1996 to 1999. While in private practice, he served the LAUSD as an environmental consultant on its "Safety Team." As a Safety Team member, Bellomo urged in November 1998 that, although construction of BLC was already in progress, the Belmont site had not been properly characterized for possible environmental hazards, and should be subject to further site tests.[160]

Initially, LAUSD retained Bellomo and the environmental firm, Environmental Strategies Company (ESC), of which he was vice president, to assist the school district in coping with contamination at other non-Belmont related projects such as the Jefferson Middle School and the new South Gate school sites. Eventually the Safety Team was requested to assist at Belmont. The Safety Team evaluated prior environmental testing at the Belmont site and the planned methane remediation measures. The team concluded that additional testing was necessary. Bellomo argued against any new concrete slab on grade installation until the site had been more fully characterized.

[160] Los Angeles District Attorney's Office interview of Angelo Bellomo (March 13, 2002). Angelo Bellomo believed that the Belmont site needed comprehensive environmental testing in order to determine what cleanup and remediation was necessary to make the school safe. The Safety Team consisted of Angelo Bellomo, Barry Groveman, Tom Soto, and Eric Nasarenko.

The LAUSD agreed with the Safety Team's recommendation, and eventually retained ESC to conduct those further tests.[161]

The District Attorney's Office has considered whether Angelo Bellomo violated the conflict of interest provisions of the Political Reform Act by influencing LAUSD to retain ESC to conduct further testing in 1999 at Belmont. The value of the contract to ESC, signed on July 20, 1999, reached $3,647,633.

Obviously, commentators reviewing only some of the evidence might assume that Bellomo received a portion of this contractual amount. However, a review of all of the available evidence, which goes well beyond the facts summarized above, does not support this allegation. LAUSD organized the Safety Team in the fall of 1998 to address community and the Department of Toxic Substances Control concerns at Jefferson Middle School and the prospective South Gate school sites. The Safety Team directed the environmental and public relations effort for the LAUSD associated with those sites.[162] In September 1998, Bellomo of ESC was requested by the LAUSD to assist in these efforts.[163] In November 1998, LAUSD requested that the Safety Team begin an evaluation of environmental conditions at the BLC. In December 1998, Bellomo informed LAUSD that he was leaving ESC to form his own consulting firm called "En Response." The evidence corroborates that Bellomo did indeed leave ESC in December 1998. LAUSD requested that Bellomo remain on the Safety Team and, for convenience, submit his billing through his former firm, ESC, via a post employment agreement.[164] At LAUSD's request, Bellomo followed this procedure.

As the scope of the environmental issues at BLC expanded in early 1999, Angelo Bellomo and the Safety Team advised LAUSD that the increased scope of work should be competitively bid

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[161] The value of the LAUSD/Environmental Strategies Company contracts are estimated at $3,647,633, which includes environmental testing and site characterization at the Belmont Learning Complex, Jefferson Middle School, and the South Gate school site. *See* LAUSD Contract Amendment, number 9900484 (July 20, 1999).

[162] Safety Team member Tom Soto was a public relations consultant. His firm was PS Enterprises. *See* letter from Richard Mason, LAUSD General Counsel, to Maria Armoudian, Joint Legislative Audit Committee (August 25, 1999).

[163] Memorandum from Richard Mason, LAUSD General Counsel and David Koch, LAUSD Chief Administrative Officer to LAUSD Board members and Dr. Ruben Zacarias (August 12, 1999).

[164] *Id.*

through LAUSD's normal procurement process.[165] LAUSD was informed and aware that an appearance of a conflict of interest was present but continued to increase ESC's scope of work, culminating in the July 26, 1999 contract.[166]

There is no evidence that Bellomo received any benefit from the ESC-LAUSD contracts after he left his former firm, ESC. Rather than influencing LAUSD to retain ESC for the work that culminated in the more than $3 million contract, the evidence shows that Bellomo had urged LAUSD to competitively bid the contract so as to avoid any appearance of conflict of interest.

J. Recent Developments

Earthquake fault identified on the Belmont site. A seismic firm began geological testing and analysis at BLC in September 2002 and LAUSD made its findings public in early December 2002. Its major finding was the discovery of a minor but troublesome earthquake fault at the BLC site, running parallel to Beaudry Avenue and beneath two unfinished BLC buildings (Administration and Academy #1). This discovery, emerging so late in the lengthy Belmont process, has had an immediate impact on BLC's fate, and again raises justifiable public concerns about the District's planning and development process. Scientists and the District are continuing to determine the full import of these test results, including whether the fault is active and thus a greater threat. However, to err on the side of caution, on December 4, 2002, Superintendent Romer announced that LAUSD would halt negotiations and planning for the construction of BLC in its *current configuration* because of these seismic concerns.[167] The Superintendent outlined several possible alternatives, including construction of a viable high school on the property using a reconfigured arrangement of school buildings.

Relevant state law regulating building on earthquake faults. Construction and development of elementary and secondary schools such as the BLC are subject to a number of

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[165] *Id*. *Also see* Safety Committee Memorandum to Dave Koch and Rich Mason (February 23, 1999).

[166] *See* Los Angeles District Attorney's Office interview of Angelo Bellomo (March 13, 2002). *See* Angelo Bellomo's e-mails to Erik Nasarenko (February 22, 1999) and Barry Groveman (March 30, 1999). Because of the crisis situation, the LAUSD continued to rely on Environmental Strategies Company to conduct the site characterization. Environmental Strategies Company agreed, however, that after the Department of Toxic Substances Control approval it would not be involved in any bid to remediate the site.

[167] LAUSD News Release dated December 4, 2002.

earthquake regulations.[168] Of particular relevance here are the provisions of Public Resources Code §§ 2621–2630, the Alquist-Priolo Earthquake Fault Zoning Act. The purpose and application of this Act have been described as follows:

> In general, the Alquist-Priolo Act is designed to 'assist cities, counties and state agencies in the exercise of their responsibility to prohibit the location of … structures for human occupancy across the trace of active faults …' (Pub. Resources Code, § 2621.5.) The State Mining and Geology Board has promulgated regulations in order to carry out this mandate. (Cal. Code Regs., Tit. 14, § 3600.) In particular, the regulations provide: 'No structure for human occupancy … shall be permitted to be placed across the trace of an active fault. Furthermore, as the area within fifty (50) feet of such active faults shall be presumed to be underlain by active branches of that fault unless proven other wise by an appropriate geologic investigation and report … no such structures shall be permitted in this area.' (Cal. Code Regs., Tit. 14, § 3603, subd.(a).) A 'fault trace' is defined in the regulations as the 'line formed by the intersection of a fault and the earth's surface'; a fault is considered 'active' if it 'has had surface displacement with Holocene time (about the last 11,000 years) ….' (Cal. Code Regs., Tit. 14, § 3601, subds.(a) and (b).)" (*Better Alternatives For Neighborhoods v. Heyman, et al.*, 212 Cal.App. 3d 663 (1998), at p. 670.)

Non-compliance with the Alquist-Priolo Act may subject a public entity to liability or may be a basis for a civil injunction. The act makes no provision for criminal enforcement.

Conclusions of possible criminality would be premature. LAUSD, the new prospective Belmont developers, and the regulatory agencies assessing the conditions at the site, face difficult legal and factual challenges in determining whether the newly reported fault meets the statutory definition of an "active fault trace" under the Alquist-Priolo Act. This issue has arisen only very recently and is still evolving as further information is gathered. Until more is known regarding the seismic fault and its implications, the District Attorney's Office cannot yet evaluate whether any criminal conduct has occurred in this regard. Moreover, because the Alquist-Priolo Act is not a criminal statute, any possible felony prosecution would have to be based on traditional criminal law statutes such as, by way of example, conspiracy or theft by false pretenses. Successful prosecutions under these statutes would typically require proof of an intentional misrepresentation of a known

[168] For example, the 1933 Field Act, Education Code section 17280-17313, imposes heightened seismic standards on school construction.

material fact. The Task Force staff has no such evidence at this time. Final resolution of this question must await the development of further facts.

K. Conclusion

The District Attorney's Office has thoroughly examined all BLC environmental issues to determine whether any environmental or other felony criminal statutes have been violated.

A key initial question is whether any hazardous waste exists or existed at the BLC site which would trigger the requirement of compliance with the standards of the Hazardous Waste Control Law. Based on the findings of Geomatrix, Inc. and a review of other relevant environmental reports and findings, it is the conclusion of the District Attorney's Office that the BLC site was not contaminated with hazardous waste within the meaning of California law. The naturally-occurring methane and hydrogen sulfide soil gases and naturally-occurring crude-oil impacted soils present at the site as a result of a nearby old oil field raise legitimate concerns but do not qualify as "hazardous waste" under California law and will not support prosecution under applicable laws.

The consensus of environmental experts this Office consulted is that the comparatively low levels of naturally-occurring gases and crude oils at the BLC site could be managed effectively by installing a mitigation system, in the same manner as such conditions are managed at other similar building sites in the Los Angeles basin. We believe that BLC project participants acted reasonably in attempting to address the soil gas problems as they were discovered.

This Office has carefully investigated the allegations that the full extent of the soil gas problem at the BLC site was subjected to a "cover-up" in order to manipulate contract negotiations, obtain project approval through deception, and avoid costly construction delays. A thorough review of the relevant evidence and events shows that there was no such cover-up. LAUSD, TBP, Turner/Kajima and other project participants utilized well-established industry experts, involved appropriate regulatory agencies in a timely fashion, and acted in a reasonable manner to address the evolving nature of the soil gas problem. Their conduct will not support prosecution under applicable legal standards.

Chapter V

BROWN ACT ISSUES

Chapter Synopsis

- The Brown Act, California's "open meeting" law, prohibits local government agencies such as LAUSD from holding closed session meetings.
- Certain meetings of LAUSD may have failed to comply with the requirements of the Brown Act, but the necessary element of *intentional* misconduct required for a criminal prosecution cannot be established.
- In response to intervention by the District Attorney's Office, the LAUSD has since revised its procedures and is now complying fully with the requirements of the Brown Act. This development reflects the new priority assigned to Brown Act enforcement by the District Attorney.

A. Introduction

The District Attorney's Office has examined whether the LAUSD violated the Brown Act, Government Code section 54950 *et seq*., by holding closed session meetings where issues were considered relating to the development and construction of the Belmont Learning Complex. Criminal violations of the Brown Act are misdemeanors and therefore are typically under the jurisdiction of the Los Angeles City Attorney's Office. However, because of the Brown Act's various provisions authorizing civil enforcement by the District Attorney (among others), the District Attorney's Office became involved in possible application of the Act to the events of Belmont. The District Attorney's Office has also considered the issue of possible criminal violations.

B. The Brown Act and its Requirements

Brown Act purposes. The Brown Act[169] is California's "open meeting law." It guarantees the right of the public to attend and participate in meetings of local government agencies, such as the Los Angeles Unified School District Board of Education. The Act prohibits non-public discussions or actions taken, except for a limited number of specified exceptions.

In its preamble to the Brown Act, the California Legislature declared:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.[170]

The California court of appeal has summarized the purposes of the Brown Act: "The Act thus serves to facilitate public participation in all phases of local government decision making and to curb misuse of the democratic process by secret legislation of public bodies."[171]

Brown Act requirements and exceptions. Under the Brown Act, the public is entitled to a copy of the local agency's meeting agenda and is permitted to address and comment on matters before the local agency. Agencies must provide advance notice of all scheduled meetings by posting a meeting agenda 72 hours before any meeting. The Brown Act also forbids the local agency from considering or voting on any issue not included in its posted agenda. However, the Act provides for limited exceptions for non-public discussion of specified topics, described below.

Intentional violation of the Brown Act is a misdemeanor, punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both.[172] However, a criminal misdemeanor violation does not occur unless a member of the local

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[169] Gov't Code § 54950 *et seq*.

[170] Gov't Code § 54950.

[171] *Epstein v. Hollywood Entertainment District* (2001) 87 Cal.App.4th 862, at 868.

[172] Government Code section 54959 makes violation of the Brown Act a misdemeanor. Because no specific punishment is prescribed, the general misdemeanor penalty provisions of Penal Code section 19 apply.

agency ". . . *intends* to deprive the public of information to which the member *knows or has reason to know the public is entitled* under this chapter."[173] The statute of limitations for a violation of the Brown Act is one year.[174]

The Brown Act contains provisions for civil enforcement by the District Attorney or any other interested party. Several appellate cases have considered civil enforcement issues and two are cited in this report.[175] The District Attorney's Office has been unable to find any record of a criminal prosecution or enforcement action by a District Attorney's Office in California prior to the Los Angeles District Attorney's Office action to compel the LAUSD to conduct public Board meetings concerning the fate of the Belmont Learning Complex in January 2001.

The District Attorney or any other interested person may enforce the provisions of the Brown Act in civil court with an action for mandamus, injunction, or declaratory relief. A successful civil action can render the local agency's actions null and void, and may result in an order that subsequent closed sessions be recorded.[176] However, under Government Code section 54960.1, civil enforcement must commence within 90 days of the violation, and the local agency has 30 days thereafter to correct or cure the violation. Under this provision, "[i]f the legislative body cures or corrects the alleged violation of the Brown Act, the action shall be dismissed and such cure or correction shall not be construed as evidence of a violation of the Brown Act."[177] Thus there is a clear Brown Act policy favoring prompt voluntary correction of Brown Act violations.

Under the Brown Act, a local agency may hold closed meetings where a public discussion could prejudice or compromise the agency's decision-making function. However, closed meetings are strictly regulated and permissible topics of discussion are confined to several specified subjects such as personnel issues, labor negotiations, and grand jury matters.[178] Among this list of permissible

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[173] Gov't Code § 54959 (emphasis added).

[174] Penal Code § 802.

[175] *See Epstein v. Hollywood Entertainment District* (2001) 87 Cal.App.4th 862*; Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109.

[176] Gov't Code § 54960.

[177] *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, at 1117, interpreting Government Code section 54960.1.

[178] *See generally* Gov't Code §§ 54953.1 and 54956–54957.

subjects of non-public discussion are matters relating to pending litigation[179] and real estate negotiations.[180]

C. LAUSD Sessions Regarding Belmont Learning Center

The District Attorney's Office has examined allegations that the LAUSD Board violated the Brown Act by engaging in improper non-exempt closed session meetings relating to the development and construction of the Belmont Learning Complex. District Attorney staff have reviewed closed session agendas for LAUSD from the mid-1990s to the present, and have interviewed LAUSD Board members who served during that period.

We find that during the relevant period from the mid-1990s until 2000, the LAUSD Board met numerous times in closed sessions regarding the school. However, these discussions were not held in intentional disregard of Brown Act requirements, but rather were held in non-public sessions because LAUSD Board members were acting on advice of counsel that these closed sessions were permissible under Brown Act exceptions permitting non-public discussions of "real estate negotiations" and "pending litigation."[181]

The evidence indicates that LAUSD Board members relied in a reasonable manner on the legal advice of Board counsel that the closed sessions were authorized under the Brown Act exceptions. Given the necessity of *intentional* misconduct before a criminal Brown Act violation occurs, the District Attorney's Office concludes the evidence is insufficient to establish a misdemeanor Brown Act violation.. And this result is consistent with the clear Brown Act policy favoring voluntary correction of violations as a preferred remedy.

However, the District Attorney's Office intervened to put the Board on notice of the mandates of the Brown Act and, in response, the Board modified its practices.

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[179] Gov't Code § 54956.9.

[180] Gov't Code § 54956.8.

[181] *See* Gov't Code §§ 54956.8, 54956.9, discussed *supra.*

D. District Attorney Intervention and LAUSD Corrections

In January 2001, the District Attorney's Office was notified by the *Daily News* newspaper and by Hotel and Restaurant Employees Union, Local 11, that LAUSD had possibly violated the Brown Act by holding a closed Board session to discuss the Belmont Learning Complex on December 12, 2000. During that meeting, the Board considered and voted on whether to sell the property or to solicit bids to complete the project.[182] LAUSD asserted that those were permissible subjects for a closed session meeting because "real estate negotiations" and "pending litigation" were considered.

On January 2, 2001, the Los Angeles District Attorney's Public Integrity Division opened an investigation. Pursuant to Government Code section 54960.1, on January 4, 2001 the Public Integrity Division sent a written demand to LAUSD Board and Superintendent Roy Romer to correct or cure the actions taken in closed sessions relating to the Belmont Learning Complex. The Public Integrity Division maintained that any Board actions taken to complete or sell the Belmont Learning Complex should be conducted in a noticed, public Board meeting, subject to public input and comment.[183] The letter stated:

> It has come to the attention of the District Attorney's Office that on December 12, 2000, a closed session meeting of the Board of Education (hereinafter the "Board") was held, during which discussion, deliberation and/or decision-making occurred relating to a subject matter under the jurisdiction of the Board, specifically, actions to be taken to either sell or solicit bids to accomplish the completion of the Belmont Learning Complex. Further, the agenda prepared for this closed session did not include any mention or description of this subject matter.

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[182] Los Angeles District Attorney's Office Public Integrity Division File No. 01-00014. Also see letter from the *Daily News* (December 20, 2000), and fax from the Hotel Employees & Restaurant Employees Union, Local 11 (January 2, 2001). On December 20, 2000, the Hotel Employees & Restaurant Employees Union, Local 11, filed a Motion for Writ of Mandate or Preliminary Injunction to compel the LAUSD to comply with the Brown Act. On March 27, 2001, Local 11's Motion for a Writ of Mandate was denied on the grounds that the LAUSD had cured any Brown Act violation. See Tentative Decision of Judge Dzintra Janavs (March 27, 2001) BS067005. (Decision now final.)

[183] Letter to the Los Angeles Board of Education and Superintendent Roy Romer (January 4, 2001).

> Pursuant to the provisions of the Government Code section 54950 et seq., (hereinafter all references are to the Government Code, unless otherwise indicated), meetings of this nature by the Board of Education are subject to the requirements that they be open and public, section 54953, that they be preceded by the posting of an agenda containing a description of each item to be discussed, section 54954.2, and that the public be afforded an opportunity to directly address the Board, section 54954.3. Furthermore, there is no legal provision that authorizes a closed session meeting regarding the aforementioned subject matter, i.e., the sale or completion of the Belmont Learning Complex.
>
> It is clear that these actions violate various provisions of the Government Code, including sections 54953 and 54954.2, for which the law provides civil as well as criminal penalties. The public has a right of access to its local legislative bodies. The Board of Education, by meetings in an unauthorized closed session and failing to provide notice of a critical, albeit controversial, subject matter hereof, has deprived the public of information to which it is lawfully entitled.
>
> Pursuant to section 54960.1, demand is hereby made upon you that the Board of Education cure or correct the unlawful actions taken in violation of sections 54953 and 54954.2, and that all further actions to effectuate the decision made during the December 12th closed session regarding the Belmont Learning Complex cease immediately.[184]

LAUSD general counsel Harold Kwalwasser answered in a letter dated January 9, 2001, refusing to provide a public Board meeting on the grounds that "... the Superintendent has the power to prepare the requests for proposal at issue without a vote of the Board." Mr. Kwalwasser claimed that "pending litigation" and "real estate negotiations" were discussed, both grounds for a closed session under the Brown Act.[185] Mr. Kwalwasser wrote:

> Without conceding that the matter was not properly noticed for the December 12th meeting, we agree that it would further enhance the confidence of the public in the

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[184] *Id.*

[185] Letter to Head Deputy David Demerjian, Public Integrity Division, Los Angeles District Attorney's Office (January 9, 2001).

> Board's actions if we renoticed the matter as both "litigation relating to Belmont" and "real estate transactions related to Belmont" for the next closed session, to be held on January 16th. We do not believe that it is possible to conduct the Board's deliberations in public, however, for the reason explained above.
>
> By providing this new notice, we will give the public the opportunity to comment on the proposal and allow the Board to consider what further action, if any, is required in light of those comments. This action will reinforce our commitment to the Brown Act.[186]

On January 17, 2001, staff of the District Attorney's Public Integrity Division met with the LAUSD general counsel to further discuss LAUSD compliance with the Brown Act. After that meeting, the LAUSD agreed to revisit, in a noticed public meeting, its prior closed session decision on whether to complete or sell the Belmont Learning Complex. In a January 19, 2001, letter to the Los Angeles District Attorney's Office, general counsel Kwalwasser wrote:

> In recognition of those considerations, we would propose to resolve this matter by renoticing the issue of the requests for proposal at the next public session of the Board. At that time, the Board will vote on rescinding the prior vote of December 12th and will hold a new vote on the question.[187]

In its next meeting, the LAUSD Board did as Mr. Kwalwasser had promised. Meeting in open session, the Board met, discussed, and voted to seek proposals to complete the Belmont Learning Complex. All subsequent indications are that LAUSD is now in compliance with the open meeting requirements of the Brown Act and has conducted and addressed all Belmont Learning Complex issues in noticed public meetings.

E. Conclusion

Based on its review of all available evidence, the District Attorney's Office concludes that, although LAUSD's past practices may have failed to comply with the requirements of the Brown

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[186] *Id*.

[187] Letter to Head Deputy David Demerjian, Public Integrity Division, Los Angles District Attorney's Office (January 19, 2001).

Act, the necessary element of *intentional* misconduct required for a criminal prosecution cannot be established.

Further, in response to intervention by the District Attorney's Office, LAUSD has since revised its procedures, and now appears to be in full compliance with the requirements of the Brown Act. This prompt corrective action is consistent with the purposes and procedures established by the Brown Act, and satisfactorily resolves this issue. This development reflects the new priority assigned to Brown Act enforcement by the District Attorney as part of his greatly increased emphasis on public integrity issues.

Chapter VI

DEVELOPER SELECTION ISSUES

Chapter Synopsis

- The evidence is insufficient to prove that Kajima bribed or attempted to bribe LAUSD planning director Shambra, or that Shambra received a bribe from Kajima, because there is a legally viable alternative explanation of funds passing between them.

- Conflict of interest charges cannot be sustained against attorney Cartwright or his law firm because Cartwright was not subject to Government Code conflicts requirements, as he lacked public officer standing or authority, and Cartwright and the firm had at most a "remote interest" exempted from those requirements. Further, LAUSD knowingly waived any potential conflict involving Cartwright.

- This Office concurs with the Fair Political Practices Commission that the evidence does not establish a violation of the Political Reform Act, because it was not "reasonably foreseeable," within the law's requirements, that Cartwright or his law firm would gain from the TBP selection. Further, there is no evidence that Cartwright or his firm realized the requisite financial gain from TBP's selection.

- The evidence will not support prosecution for grand theft by false pretenses principally because: (1) there were no provable false pretenses relied upon by LAUSD; (2) LAUSD, the ostensible victim, relied on its own investigation by its Oversight Committee, negating any arguable false pretense crime; and (3) there is no provable specific intent to defraud on the part of any of the parties.

A. Introduction

As part of its investigation into possible criminal wrongdoing connected with the Belmont Learning Complex (BLC), the District Attorney's Office has examined the procedures by which the developer was selected and the construction contract awarded. It has been suggested that, as a result of impermissible conflicts of interest, the project was wrongfully steered to Temple Beaudry Partners (TBP), and its principal partner Kajima, and thus that the selection process violated state laws governing such contracts.

These allegations have been described by some as "bid rigging" in the BLC developer selection process, but use of that term is a misnomer in this context. Although "bid rigging" might be used in a lay sense to describe steering or improper influence in a bidding process, the only correct legal meaning of "bid rigging" in California law is in reference to a violation of California's basic antitrust statute, the Cartwright Act, which prohibits agreements among competitors in restraint of trade.[188] True bid rigging in California law is a sub-species of antitrust price fixing, and is *per se* illegal under California's Cartwright Act.[189] However, the allegations and evidence in the BLC matter do not involve true bid rigging in this sense, as there is no claim of collusion among the various competing bidders for the BLC contract. Rather, the allegations at issue concern possible violations of California's laws governing bribery, public contracting, and undue influence.

This Office has investigated all known allegations of possible criminal violation of the several California laws governing the public contracting process. These possible violations include:

- Bribery (Penal Code sections 67, 67.5, and 68);
- Conflicts of interest (Government Code section 1090);
- Political Reform Act violations (Government Code section 91000 *et seq*.), and
- Grand theft by false pretenses (Penal Code section 487).

Although not criminal in nature, alleged non-compliance with the Public Contract Code has also been considered.

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[188] *See* Bus. & Prof. Code section 16720 *et seq*., prohibiting agreements in restraint of trade. In California law "bid rigging" refers only to the antitrust violation consisting of an agreement among two or more competitors to restrain trade by collusion in manipulating the process of competitive bidding. True bid rigging typically involves a conspiracy among the competing firms to submit bids with prices and specifications arranged to ensure that one contract goes to a designated conspirator, with subsequent contracts rigged for other conspirators. *See Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.* (1971) 4 Cal.3d 354; *People v. Inland Bid Depository* (1965) 233 Cal. App.2d 602. *See generally* Papageorge & Fellmeth, *California White Collar Crime,* 2d ed. (Lexis, 2002) at 2-72 to 2-73.

[189] *Oakland-Alameda County Builders' Exchange*, *supra* note 188, 4 Cal.3d at 363.

The District Attorney's Office has examined the available evidence and has concluded that there is insufficient evidence to establish the existence of any of the above crimes. The analysis is supported by the chronology of the bidding process, which is summarized below.

B. Chronology of Developer Selection Process

The sequence of events leading to the selection of Temple Beaudry Partners for the Belmont Learning Complex project was as follows:

LAUSD Board approves the Belmont development concept. On March 1, 1994, by a vote of six Board members,[190] the Board approved the concept of developing the 35-acre Temple-Beaudry site as a joint venture with the private sector with the goal of producing a mixed-use development. The Board hoped that revenue generated by a retail area at the school site would help offset some of the costs of the school development. Initially, a high school and a middle school were envisioned, but it was decided to develop the site for a high school only, and to convert the existing Belmont High School to a middle school. The Request For Qualifications/Request For Proposal (RFP) did not invite proposals based on a price competition, but instead required a maximum fixed price to be included in a Disposition and Development Agreement.

Board issues Request for Proposal–First Phase (RFP I). On September 9, 1994, LAUSD informed developers that the high school must be designed and built according to District and State requirements, and that the maximum price for the school would be paid at an agreed-upon time or through a long-term lease arrangement. Developers were required to submit financial feasibility information as part of their proposals, and an analysis of financial return to LAUSD for the non-school, or retail portion, of their proposals. The Request For Proposal requested that architect Ernesto Vasquez be retained in an overall supervisory role.

On November 3, 1994, Temple Beaudry Partners (TBP) and other respondents — among which were CRSS/TELACU and Goldrich-Kest & Associates — submitted their proposals. The accounting firm of Coopers & Lybrand, after analyzing the proposals, informed the District that none of the respondents had submitted sufficient information about their financial ability to develop the project, nor did any of the respondents include market research regarding the retail component. The Request For Qualifications had required this information.

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[190] Board member Jeff Horton was absent.

Board issues Request for Proposal–Second Phase (RFP II) (school portion). In December 1994, Coopers & Lybrand had reviewed each of the respondent's proposals, and noted strengths and weaknesses in the financial aspects of the non-school (or retail) portion of the project. The Phase II request then required that the proposals include further information regarding respondents' financial abilities. The Phase II RFP also set forth specific criteria the evaluators were to use in selecting the developer for the entire project, and provided that the evaluators would rate the proposals in three categories with up to 100 points possible. This RFP also established specific requirements which were to be included in both the school and retail portions of the project.

In March 1995, Temple Beaudry Partners, CRSS/TELACU, and Goldrich-Kest & Associates responded to the Phase II Request For Proposal. The proposal of each respondent followed the requirements set forth in the Phase II RFP, with the exception of the Goldrich-Kest proposal, which included retail activity on land obtained by condemnation, an improper use specifically prohibited in the RFP.

Attorney Cartwright writes attorney Jordan. On April 4, 1995, David Cartwright, the attorney representing the District on the project, wrote a letter to Martha Jordan, an attorney with the Latham & Watkins law firm, who was representing TBP. The letter informed her that a meeting held the week before had raised concerns that harmed TBP's chances of being selected as the developer for the project. The letter identified those areas of concern.

Attorney Cartwright discloses possible conflict of interest to LAUSD. In an April 6, 1995, letter David Cartwright informed LAUSD general counsel Richard Mason that the O'Melveny & Myers law firm, and the Ernst & Young/Leventhal accounting firm, had prior business dealings with Kajima International, one of the partners in TBP. The letter also informed Mason that Ernesto Vasquez had been retained as the TBP's architect.

LAUSD forms Evaluation Committee to consider proposals. On April 24, 1995, the respondents' proposals were considered by an Evaluation Committee formed by Dominic Shambra, Director of LAUSD's Office of Planning and Development. The Committee included attorneys David Cartwright and Lisa Gooden of the law firm of O'Melveny & Myers, outside District consultant Wayne Wedin, and accountants Steve Valenzuela and Robert Starkman of the accounting firm of Ernst & Young/Leventhal. Although not an official member of the Committee, Shambra participated in the ratings of the respondents. The Committee formulated lists of questions and scheduled interviews of representatives of the RFP respondents.

Evaluation Committee interviews respondents. From May 12 to May 15, 1995, the Evaluation Committee interviewed members of TBP, CRSS/TELACU, and Goldrich-Kest, and noted the strengths and weaknesses of each proposal. Notes of those interviews indicate that the Committee found a major benefit in TBP's ability to provide financing for the project through Kajima resources. It was noted that a drawback to TBP's proposal was that the projected retail revenues were 100 percent contingent, and TBP proposed to sell the retail component of the project to institutional investors upon its completion.

Evaluation Committee rates TBP best. On or about May 19, 1995, the Evaluation Committee rated the respondents in the three categories set forth in the Phase II Request For Proposal. The Committee's combined scores were 89 points for TBP, 83 points for CRSS/TELACU, and 75 points for Goldrich-Kest. All members of the Committee rated TBP as having presented the best proposal.

Evaluation Committee recommends TBP. On or about June 9, 1995, the Committee, through Wayne Wedin, submitted its recommendation that Temple Beaudry Partners be selected for exclusive negotiations on the project.

Wedin's memorandum included copies of the interviews conducted with the respondents, the narrative and evaluation matrix that the Committee had used, Cartwright and Gooden's written materials, and a June 7, 1995, summary of economic benefits written by Steve Valenzuela. At an LAUSD Business, Finance, Audit and Technology Committee meeting, held on August 3, 1995, Board members in attendance raised a number of issues regarding the evaluation process. Planning director Shambra responded to those concerns on August 16, 1995, and included a calculation with a new mathematical formula. This formula changed the scores each respondent had received, and included in the new calculations was a mathematical error of 100 points favoring TBP. However, even after setting aside the error, TBP was rated first.

LAUSD Superintendent recommends TBP. On August 21, 1995, the LAUSD Superintendent of Schools sent to the Board his recommendation that exclusive negotiations begin with Temple Beaudry Partners to develop the Belmont project. The Superintendent recommended that the District enter into exclusive negotiations with the goal of executing a joint venture agreement with TBP to construct the Belmont Learning Complex.

Attorney Cartwright again discloses potential conflicts to LAUSD. On September 12, 1995, O'Melveny attorney Cartwright wrote to LAUSD general counsel Mason regarding the potential conflicts of interest. As he had done on April 6, 1995, Cartwright informed Mason of the potential conflicts arising out of Kajima's participation in the TBP proposal, both as to O'Melveny & Myers and Ernst & Young/Leventhal. He further informed Mason of improper conduct by the two respondents who had not been recommended for exclusive negotiations.

LAUSD Board selects Temple Beaudry Partners for exclusive negotiations. On September 18, 1995, the Board of Education selected Temple Beaudry Partners as the developer for exclusive negotiations for the BLC project.

At the meeting, a speaker informed the Board of a potential conflict of interest on the part of the O'Melveny & Myers law firm, because of that firm's representation of Kajima. LAUSD general counsel Mason informed the Board that attorney Cartwright had represented the District since the start of the Belmont project, and had represented the District in many other matters. Mason told the Board: he wanted Cartwright to continue to represent the District; that Cartwright had informed him months before of the potential conflict; and that Mason had waived the potential conflict. For his part, attorney Cartwright told the Board he had loyalty only to the District, and that he had never personally represented Kajima. Cartwright said he would resign from the project if the Board so desired.

Mason further told the Board that the exclusive negotiations might or might not result in a Disposition and Development Agreement (DDA) with Temple Beaudry Partners. Mason also indicated that the Board had the option of canceling negotiations at any time, and that the Board had to vote again to commit itself to the DDA with Temple Beaudry Partners. Steve Valenzuela told the Board that the retail portion of the project was still being negotiated, and that efforts would be made to maximize the return from that component, if market forces supported the component.

The Board then voted to enter into exclusive negotiations with Temple Beaudry Partners, with the proviso that an outside independent team of experts would be used to assist LAUSD by monitoring and evaluating any proposal or contract during the negotiation period.[191]

[191] Four Board members voted "yes"; three abstained.

Analyst Rasmussen reports to Board. On October 5, 1995, Roger Rasmussen, head of the LAUSD Independent Analysis Unit reported to the Board, presenting his criteria for the project. Rasmussen's written analysis was a set of working criteria for evaluating the Temple Beaudry Partners' design, and provided that the main purpose of the project was to construct a school. He said the retail and affordable housing components would be negotiated; that the District expected TBP to finance it; and that those components might not be economically viable. His report indicated that State funding would be sought for the school, but if that funding turned out to be unavailable, it would be necessary for the District to issue Certificates of Participation to finance the school.

LAUSD Board forms a Design Oversight Committee. On November 20, 1995, the Board voted to form the Design Oversight Committee for the Temple Beaudry Partners' project. The Oversight Committee consisted of seven experts in various fields, including construction, school design, retail feasibility, architecture, industrial engineering, and the design-build process.

The Oversight Committee met eleven times. Their concerns and recommendations were presented in written form to the Board through Roger Rasmussen. The Committee examined and recommended changes in Temple Beaudry Partners' Exclusive Negotiations Agreement (ENA), the Memorandum of Understanding (MOU) and the Disposition and Development Agreement (DDA). Many of the Committee's recommendations were incorporated into the DDA, and on April 14, 1997, the Committee, through its Chairman, Edward Blakely, recommended to the Board that the Disposition and Development Agreement be adopted.

LAUSD Board reviews the Disposition and Development Agreement. On April 14, 1997, the Board began reviewing and considering the Temple Beaudry Partners' Disposition and Development Agreement. The Board had conducted numerous closed session Board meetings during the exclusive negotiations period regarding instructions to the negotiators. These closed sessions began in October 1995, and continued through to the Board's final approval of the DDA on April 21, 1997. At an April 14, 1997, meeting, planning director Shambra told the Board that the Disposition and Development Agreement Guaranteed Maximum Price was based on the State Allocation Board Form 506 B, and that the Guaranteed Maximum Price was $85,875,800. Shambra said a State waiver would be sought for the requirement of a performance bond, because it was not necessary in view of the Completion Guarantee in the Disposition and Development Agreement. He said a contingency for environmental mitigation would bring the total project cost to $87.1 million. Shambra said the retail and Joint Powers Authority components of the project were not yet completed, were subject to further negotiation and funding, and would require additional agreements outside the Disposition and Development Agreement. Shambra also indicated the Board could

cancel Temple Beaudry Partners' proposed project and send the Belmont project out for a new round of bids, but this would result in delay.

Dr. Blakely, Chairman of the Oversight Committee, told the Board that the Committee had concluded that the project could be completed based on the proposed design and within the budget. He further told the Board that the retail component was feasible, but needed more work to meet the economic needs of the District. He said that if retail were not built, the District could use the space for other school uses.

Attorney Cartwright told the Board that the District would share in any savings realized below the Guaranteed Maximum Price, once the hard bids from the subcontractors were secured. He said the Disposition and Development Agreement provided that the lowest responsible subcontractor would be selected, and that at least three subcontractor bids would be necessary.

Board approves the Disposition and Development Agreement for Temple Beaudry Partners. On April 21, 1997, the LAUSD Board of Education approved the Temple Beaudry Partners' Disposition and Development Agreement for the Belmont project.

Day Higuchi, President of UTLA, who had filed suit against the District three days before the Board meeting,[192] argued against the Disposition and Development Agreement, saying it violated the BB Bond provisions that had recently been approved by the voters. Higuchi said that the BB Oversight Committee must approve the project before the Board could approve it.

Board member Julie Korenstein complained that the school cost alone was $85 million, and did not include housing, retail, or the JPA. Board member Jeff Horton lauded the Disposition and Development Agreement for its Guaranteed Maximum Price feature. He argued that the school portion of the project had to be built, regardless of the uncertainty of the completion of the other components being completed. When some Board members expressed concern about the financing of the project, general counsel Mason told the Board that the District was potentially liable to fund 100 percent of the construction if either State funds or BB Bond funds were not available. District Chief Financial Officer Henry Jones also told the Board that it would cost the District three to five million dollars annually if the District did provide 100 percent of the construction cost. Planning

[192] *Day Higuchi, et al., v. LAUSD, et al.* Los Angeles Superior Court No. BC169554 (filed April 18, 1997).

director Shambra told the Board that if the retail component of the project failed to materialize, that approximately $6 million would be added to the cost of the school, because that was the portion of the costs of the podium and parking allocated to the retail component. He also said that if the City did not provide Joint Powers Authority money to fund that component of the project, there would be additional grading costs added to the school in the amount of $300,000 to $400,000. After this discussion, the Board voted 4 to 3 to approve the Disposition and Development Agreement and thus the selection of Temple Beaudry Partners was complete.

C. Bribery Issues

Elements of the offense of bribery. California has numerous bribery statutes, all of which proceed on the same basic assumptions as to what constitutes a bribe.[193] The statutes distinguish between the bribe-receiver (or asker) and the bribe-giver (or offeror). The bribery statutes also distinguish between classifications of the persons who may be involved in the bribery transactions such as executive and ministerial officers, judicial officers, legislative officers, jurors, witnesses, and others.

An executive or ministerial officer who asks for, receives, or agrees to receive a bribe commits a felony punishable by imprisonment in the state prison for two, three, or four years.[194] The bribery or attempted bribery of an executive officer is a felony punishable by imprisonment in the state prison for two, three, or four years.[195] Bribery of a ministerial official is a misdemeanor or felony depending on the value the bribe offered or given. If the theft of the thing given would be petty theft, then the bribery of the ministerial official is a misdemeanor. If the theft of the thing given would be grand theft, then the bribery of the ministerial official is a felony.[196]

Generally, whether duties entrusted to a public officer are "executive" or "ministerial" in character turns on whether the duties to be performed are discretionary or imperative. In the former,

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[193] "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity." Pen. Code § 7(6).

[194] Pen. Code § 68.

[195] Pen. Code § 67.

[196] Pen. Code § 67.5.

the public servant is an "executive officer", and in the latter a "ministerial officer."[197] Here, the LAUSD Board exercised the broadest discretion and was the ultimate decision-maker within the school district. Its Board members are "executive officers" within the meaning of this law.

Bribery of a school board is specifically addressed in Education Code section 35230, which provides, in pertinent part:

> The offering of any valuable thing to any member of the governing board of any school district, with the intent to influence his action in regard to … the making of any contract to which the board of which he is a member is a party, or the acceptance by any member of the governing board of any valuable thing, with corrupt intent, is a misdemeanor.[198]

The specific provisions of Education Code section 35230 were enacted after the more general bribery provisions of Penal Code sections 67,67.5, and 68. However, case law holds that the more general felony statute found in the Penal Code is applicable.[199]

Generally, bribery requires proof of the following elements:[200]

- A person gave or offered, or asked for, received or agreed to receive a bribe;
- That person gave or offered the bribe with the specific intent corruptly[201] to influence another in their official capacity, or that the person requesting, receiving, or agreeing to receive the bribe did so upon an understanding that their official capacity would be influenced thereby; and

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[197] *People v. Strohl* (1976) 57 Cal.App.3d 347.

[198] Ed. Code § 35230.

[199] *People v. Darby* (1952) 114 Cal.App.2d 412.

[200] CALJIC No. 7.00, 7.01, and 7.02.

[201] The word "corruptly" means with a wrongful design to acquire or cause some monetary of other advantage to the person guilty of the act or omission referred to, or to some other person. CALJIC No. 7.00.5.

- The person to whom the bribe was given or offered, or the person who asked for, received, or agreed to receive the bribe was an executive officer or ministerial officer in this state.

Alleged bribery of Dominic Shambra. The District Attorney's Office has investigated allegations that Dominic Shambra, Director of LAUSD's Office of Planning and Development, was bribed by Kajima to support the selection of Temple Beaudry Partners as the developer of the Belmont Learning Complex project.

Financial records show that Kajima Construction Services issued a check for $6,279, dated March 20, 1999, to N.S. Construction, a firm owned by Dominic Shambra's son, Nick Shambra. This check was endorsed by Nick Shambra to Dominic Shambra and deposited into Dominic Shambra's account on May 7, 1999, less $1,279 cash back. It has been suggested that this $6,279 check deposited into Dominic Shambra's account represents a bribe passing from Kajima to Shambra. Absent an exculpatory explanation, money flowing from Kajima to Dominic Shambra tends to incriminate because, as the Director of the LAUSD's Office of Planning and Development and the school official most responsible for Belmont, Shambra's obligation was to advance the interests of LAUSD and to operate at arms length with Kajima and other businesses negotiating with LAUSD. In his role as LAUSD planning director, Shambra should have been doing nothing which would have resulted in his receiving compensation from a firm in Kajima's position.

However, after conducting its investigation, the District Attorney's Office concludes there is a reasonable, non-criminal explanation for the payment, and as a result there is insufficient evidence to prove a charge of bribery.

Contractor State Licensing Board (CSLB) records establish that Nicholas Shambra is a licensed general contractor (including a specialist license for ceramic and mosaic tile), doing business as "N.S. Construction," under CSLB license number 613271. Nicholas Shambra's contractor license was issued on February 24, 1991.

Dominic Shambra contends that he lent his son Nicholas in excess of $30,000 from 1995 through 2001 because his son was experiencing financial and divorce-related difficulties. Dominic Shambra states that his son now lives with him in Dominic Shambra's home.[202] The elder

[202] Los Angeles District Attorney's Office interview of Dominic Shambra (October 24, 2001).

Shambra's subpoenaed financial records corroborate his statement that he provided financial support to his son from 1995 through 2001.

On January 8, 1998, Dominic Shambra retired from the LAUSD and was no longer involved in the Belmont project.

Copies of construction subcontracts, change orders, invoices, building permits, checks, invoices, building plans, and other documents provided by Kajima Construction Services, Inc., show that N.S. Construction performed subcontractor work in 1998 and 1999 on three tenant improvement/remodeling projects where Kajima acted as the general contractor. The documents show that NS Construction performed construction work as follows:

Anthem Health101 N. Brand, Suite 1230 Glendale, CA	$28,783.00	Miscellaneous concrete work
EV Battery6550 Katella Ave. Cypress, CA	$11,279.00	Demolition, forming, concrete work
(HUD) AT&T Center611 West Sixth St., Suite 3800 Los Angeles, CA	$ 3,838.00	Demolition, miscellaneous site work

District Attorney investigators visited each of the locations and observed the completed work. Witnesses interviewed from each location recall tenant improvement/remodeling work being performed during the applicable time period with Kajima as the general contractor. Building permits and inspection records for the EV Battery and AT&T locations were obtained. Although no witness had a specific recollection of N.S. Construction, N.S. Construction's role on each of the projects was minor, amounting to only six percent of the dollar value of all the work, so its presence would not necessarily be great. At the AT&T location, a witness reviewed his files and provided investigators with a three-page document titled "Kajima Project Directory." That document lists N.S. Construction on the first page. No evidence has been found which contradicts the conclusion that N.S. Construction actually performed the work as set forth in the construction records.

According to those construction records, the $6,279 check, issued by Kajima Construction Services and dated March 20, 1999, represented the final payment to N.S. Construction under the EV Battery subcontract. Dominic Shambra's financial records establish that approximately six weeks later the check (which had been endorsed to him by his son) was deposited to Dominic's account, less $1,279 cash back. Dominic Shambra states that he deposited his son's check to his account, less some cash, which he gave to his son. Dominic Shambra asserts that his son signed over the check in 1999 as partial repayment for his son's many loans.

In order to prove a criminal bribery violation in this context, the prosecution would need to prove that Kajima paid, or offered to pay, Shambra with the intent to corruptly influence him in his official capacity, or that Shambra received, or agreed to receive, the payment with the understanding he would be influenced. A fact-finder considering a prosecution based on the existing evidence would be required to apply the legal principle of CALJIC 2.02, which requires that if there are two reasonable interpretations of circumstantial evidence, one interpretation pointing to innocence and one to guilt, the fact-finder must accept as true the interpretation pointing to innocence. In the present matter, Dominic Shambra's interpretation of the circumstantial evidence of the $6,279 check is reasonable, consistent with the evidence, and points to innocence.

The documentary evidence shows that N.S. Construction performed construction subcontract work for Kajima. The documentary evidence also shows that Dominic Shambra previously lent money to his son. Dominic Shambra's innocent explanation that his son repaid some of that debt with the Kajima check is not inherently unreasonable, and would be difficult or impossible to disprove.

In addition, the timing of the $6,279 check and the manner of its deposit are both inconsistent with a theory of bribery. Dominic Shambra's support for the Kajima and Temple Beaudry Partners' proposal dated from the mid-1990s. LAUSD's exclusive negotiations with Temple Beaudry Partners began in 1995. After 18 months of negotiations, the LAUSD Board entered into the Disposition and Development Agreement with Temple Beaudry Partners on April 30, 1997. On January 8, 1998, of the following year, Dominic Shambra retired from LAUSD. An interpretation of the evidence that Dominic Shambra received a bribe payment from Kajima over a year later (May of 1999) by depositing a Kajima check directly into his account, and thereby creating a traceable trail of evidence, is less than convincing.

In summary, the evidence is insufficient to prove that Kajima bribed or attempted to bribe Dominic Shambra, or that Dominic Shambra received a bribe from Kajima.

D. Conflict of Interest Issues (Government Code section 1090)

Purposes and standards of conflict of interest laws. Government Code section 1090 prohibits government officers and employees from having financial self-interests in contracts that have been entered into by their agencies.[203] The leading case of *People v. Honig*[204] sets forth the purpose of such conflict of interest laws:

> The conflict of interests statutes are based upon the truism that a person cannot serve two masters simultaneously. The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office. Yet it is recognized that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the government. Consequently, our conflict of interest statutes are concerned with what might have happened rather than merely what actually happened. They are aimed at eliminating temptation, avoiding the appearance of impropriety and assuring the government of the officer's undivided and uncompromised allegiance. Their objective is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision. (Citations omitted).[205]

In a conflict of interest case under this statute, it is unnecessary to prove actual fraud, dishonesty, or loss to the government. The concept of the statute is to establish objective rules governing the conduct of government officials. "Criminal responsibility is assessed without regard to whether the contract is fair or oppressive."[206]

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[203] Until 1942, section 1090 covered only elected governmental officers or officers with executive authority. "Mere employees," *i.e.*, governmental employees with the authority to enter contracts on behalf of government, such as a purchasing agent, were not covered. (*Cleland v. Superior Court of Mendocino County* (1942) 52 Cal.App.2d 530.) In 1943 the legislature amended section 1090 to include "mere employees."

[204] (1996) 48 Cal.App.4th 289.

[205] *Id.* at 313–314.

[206] *Id*. at 314.

Government Code section 1097 makes a willful violation of section 1090 a felony "punishable by a fine or not more than one thousand dollars ($1,000), or by imprisonment in the state prison." A conviction also results in permanent disqualification from holding state office.

Elements of the conflict of interest offense. Government Code section 1090 provides:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

In *Honig,* the Court of Appeal approved the following jury instruction setting forth the necessary elements that must be proven in a criminal prosecution under section 1090:

> Any state officer who, acting in his official capacity, who willfully makes or causes to be made a contract in which he has a financial interest is guilty of a violation of Government Code sections 1090 and 1097.
>
> In order to prove such a crime, each of the following elements must be proved:
>
> - that the person is a state officer;
> - that the person acted in his official capacity;
> - that the person knowingly and
> - willfully made or cause to be made a contract in which he had a financial interest.[207]

[207] *Id.* at 322.

In the *Honig* case, jurors were also instructed that fraud, dishonesty, or loss were not elements of the offense. "Financially interested" was defined as any financial interest, whether direct or indirect, which would interfere with the official's duty.[208]

LAUSD waiver of potential conflict involving O'Melveny & Myers. The LAUSD Board in 1995 undertook action which it intended as a waiver of any potential conflict involving David Cartwright, O'Melveny & Myers, and Kajima. Under the California Rules of Professional Conduct,[209] attorneys are prohibited from representing clients with adverse interests, absent informed written consent from each client.[210] After a public discussion of the conflict issue, LAUSD chose to waive any conflict or potential conflict attributable to their counsel, David Cartwright. Such a waiver would be pertinent to obligations and restrictions imposed on David Cartwright as an attorney subject to the California Rules of Professional Conduct.

Conflict of interest law set forth in Government Code section 1090 imposes a substantially different standard. If a member of a government board has a financial conflict of interest in a proposed contract, there can be no contract. Even if the member "abstains" or recuses himself from consideration, a board is prohibited from entering into such a contract, under principles stated in *Thorpe v. Long Beach Community College District*.[211] While *Thorpe* focused on a member's

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[208] "The phrase 'financially interested' as used in Government Code section 1090 means any financial interest which might interfere with a state officer's unqualified devotion to his public duty. The interest may be direct or indirect. It includes any monetary or proprietary benefit, or gain of any sort or the contingent possibility of monetary or proprietary benefits. The interest is direct when the state officer, in his official capacity, does business with himself in his private capacity. The interest is indirect when the state officer, or agency he directs, enters into a contract in his or its official capacity with an individual or entity, which individual or entity, by reason of the state officer's relationship to the individual or entity at the time the contract is entered into, is in a position to render actual or potential pecuniary benefits directly or indirectly to the state officer based on the contract the individual or entity has received." (*Id.* at 322–23.)

[209] The professional conduct of California attorneys is governed by the Rules of Professional Conduct and is administered by the California State Bar. Violation of these rules subjects the attorney to discipline by the Bar. *See* Bus. and Prof. Code § 6076 *et seq*.

[210] California Rules of Professional Conduct, Rule 3-310(C)(1) and (2) provide:

> (C) A member shall not, without the informed written consent of each client:
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict....

[211] (2000) 83 Cal.App.4th 655, where the Court of Appeal explained that section 1090 prohibits this procedure because the other public officers may be influenced by the self-interested member.

abstention, the *Thorpe* holding would also prohibit other board members from "waiving" a prohibited conflict of interest. The conflicted board member might influence other members, especially when that conflicted member remains involved in the consideration of the contract.

In addition, in September of 1999 LAUSD filed a malpractice lawsuit against Cartwright and O'Melveny & Myers[212] claiming Cartwright inadequately advised school officials, especially about environmental issues, while assuming for himself an executive decision-making role in the promotion and management of the Belmont project. In January of 2002 O'Melveny prevailed on a summary judgment motion and obtained dismissal of the suit.[213] LAUSD appealed and while the appeal was pending, the parties resolved the matter through settlement in April of 2002.[214] The summary judgment rejection of plaintiff's theory of wrongdoing by Cartwright and his law firm — occurring under the less stringent civil litigation standards — casts real doubt on the viability of such a theory in a criminal prosecution.

Outside consultants. The original purpose of section 1090 was to regulate the conduct of elected public officers or appointed officers with executive authority. Today, all government employees who enter into contracts on behalf of the state are subject to section 1090. At issue here is whether section 1090 pertains to consultants or agents such as attorneys. The express language of sections 1090, 1091, and 1092 pertains to public officers or employees who directly enter, or vote to enter, contracts, on behalf of the state. Section 1090 provides:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.

Section 1092 further provides that an action may be brought to have any contract in violation of section 1090 declared void. The statutory language is limited to public officers who have entered,

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[212] *LAUSD v. Cartwright et al.*, Los Angeles Superior Court Case No. BC216899 (filed September 16, 1999)

[213] Statement of Decisions, *LAUSD v. Cartwright et al.*, Los Angeles Superior Court Case No. BC216899 (January 24, 2002).

[214] *Los Angeles Times*, April 10, 2002. The article states that rather than LAUSD pursuing its appeal, and in exchange for its forbearance, LAUSD accepted $3 million from its former attorneys. The LAUSD general counsel stated: "The district and the law firm both decided that the cost and uncertainty of future litigation made this settlement reasonable."

or voted to enter into a contract in violation of section 1090.[215] Therefore, the express statutory language does not apply to outside consultants, including non-voting outside legal counsel such as David Cartwright.

California courts have repeatedly stated that section 1090 must not be narrowly applied.[216] However, the issue of outside legal counsel has been addressed in two related appellate opinions, *Schaefer v. Berinstein* ("*Schaefer I*")[217] and *Schaefer v. Berinstein* ("*Schaefer II"*),[218] upholding *Schaefer I*. These two decisions, along with a companion case,[219] involved the actions of an outside attorney who was hired by the City of Compton to rehabilitate, perfect title, and market real property held by Compton.[220] The attorney engaged in a series of fraudulent real estate transactions selling the city's property to his wife, friends, and dummy companies he controlled. Acting on behalf of the City of Compton, the attorney worked to clear title and market the property. The attorney enjoyed strong support from the Compton City Council.[221]

A taxpayer suit to halt these practices was brought in 1956. Ultimately, the court of appeal held that the attorney was a public officer under the Compton City Charter and that section 1090 of the Government Code applied to his actions:

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[215] Section 1092 provides:

> Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member.

[216] *See People v. Honig* (1996) 48 Cal.App.4th 289.

[217] (1956) 140 Cal.App.2d 278.

[218] (1960) 180 Cal.App.2d 107.

[219] *Terry v. Bender* (1956) 143 Cal.App.2d 198. In this case, taxpayer Martin Schaefer sought to enjoin payment of $15,000 by the City of Compton for services rendered to attorney John Bender, *after* Mr. Bender bribed Compton mayor Frank Bussing with cash and real property for his support in continuing Mr. Bender's position as a Compton special attorney.

[220] It was estimated that one quarter of the city of Compton was encumbered in this fashion. *Schaefer I*, *supra* note 217, at 285.

[221] *See Terry v. Bender*, *supra* note 219.

> Section 1090 of the Government Code states that 'city officers shall not be interested in any contract made by them in their official capacity.' A person merely in an advisory position to a city is affected by the conflicts of interests rule. Bender [the attorney] was employed by the city of Compton as a special city attorney for the purpose of rehabilitating tax-deeded and special assessment frozen properties situated within the city. He was an officer and agent of the city and as such was in a position to advise the city council as to what action should be taken relative to the property involved. He could not buy the property in his own name and he could not do so through a dummy. The contracts to purchase from the city and the ultimate sales were contrary to public policy and are void.[222]

Under the reasoning of *Schaefer I* and *Schaefer II*, an outside legal counsel for a government body is subject to section 1090 when the attorney *is vested with the authority of a public officer by the state, and the attorney thereafter acts as a public officer on behalf of the state*. *Schaefer I* and *Schaefer II* appear to be the only California cases on this issue, although a formal opinion of the California Attorney General reaches the same conclusion.[223] In the facts of *Schaefer I*, the attorney assumed the role of a public officer at the direction of the Compton City Council. The attorney had decision-making authority. The attorney performed this job directly and personally. He drafted and entered into the contracts for the city of Compton.[224]

Conflict allegations concerning David Cartwright and O'Melveny & Myers. David Cartwright, LAUSD's outside counsel in the BLC matter, was a partner in the Los Angeles law firm of O'Melveny & Myers. O'Melveny also represented Kajima, the principal partner in Temple Beaudry Partners, on unrelated legal matters. It has been suggested that attorney Cartwright steered the Belmont contract to Temple Beaudry Partners in order to benefit his firm's other client, Kajima, and violated section 1090 in the process.

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[222] *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, at 291 (citations omitted).

[223] *See* 46 Ops. Atty. Gen. 74, October 14, 1965.

[224] The remedy sought in *Schaefer I* was to have the contracts declared void. This is the usual section 1090 case. Criminal prosecutions are rare. Section 1092 provides: "Every contract made in violation of any of the provisions of section 1090 may be avoided at the instance of any party except the officer interested therein. No such contract may be avoided because of the interest of an officer therein unless such contract is made in the official capacity of such officer, or by a board or body of which he is a member."

Attorney Cartwright's conduct, however, is fundamentally different and is factually distinguishable from the situation of the Compton attorney in the *Schaefer* cases. The Compton special attorney had been vested with the authority of a public officer by the City of Compton; he negotiated and contracted directly on behalf of the City of Compton; and he was financially interested in contracts he made in his official capacity.

In contrast, the LAUSD Board, and not David Cartwright, contracted with Temple Beaudry Partners. As outside counsel, David Cartwright may have recommended Temple Beaudry Partners and drafted the Disposition and Development Agreement, but it was the Board that made the decision to enter the contract. Most critically, *David Cartwright was not vested with authority to act as a public officer by the LAUSD Board.* He had no power or authority to contractually bind LAUSD, nor did he direct or order the LAUSD Board to enter into the Disposition and Development Agreement (DDA). Under these circumstances, David Cartwright was not subject to section 1090 requirements because he was not a public officer and had no decision-making authority.

The Compton special attorney entered into contracts where he had a financial interest. This financial self-dealing was known to the mayor and members of the City Council, but was kept secret from the public. At the Belmont Learning Complex, O'Melveny did not represent Kajima or Temple Beaudry Partners in the BLC negotiations and O'Melveny's relationship with Kajima was a matter of public knowledge.[225] Moreover, O'Melveny's representation of Kajima involved unrelated legal matters, often outside of the Los Angeles area. O'Melveny's relationship with Kajima was pre-existing and ongoing, and there is no evidence that O'Melveny's continuing representation of Kajima was dependent in any way on the Belmont agreement, or that O'Melveny received any financial benefit as a result of that agreement.[226]

Finally, David Cartwright and O'Melveny & Myers have, at most, a "remote interest" in the Belmont Learning Complex contract. Public officers who have a "remote interest" in the contract are not subject to section 1090 if the public officer discloses the interest and the interested member's vote is not counted.

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[225] *See Los Angeles Times* at www.latimes.com, *Los Angeles Daily News*, at www.dailynews.com, and the *LA Weekly*, at www.laweekly.com for special coverage and reports on the Belmont Learning Complex during this period.

[226] *Schaefer II* discusses a similar fact pattern where the attorney sold real property to a party that he represented on another, unrelated matter and the court noted that this relationship was known to the city council. *Schaefer II* left undisturbed the trial court's finding that this procedure was permissible. *Schaefer II*, *supra* note 218, at 126.

Government Code section 1091(a) provides:

> An officer shall not be deemed to be interested in contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of the interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

Section 1091(b)(6) provides:

> (b) As used in this article, 'remote interest' means any of the following:
>
> (6) That of an attorney of the contracting party or that of an owner, office, employee, or agent of a firm which render, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

David Cartwright had no vote on the issue of approval of the Disposition and Development Agreement, he disclosed O'Melveny's relationship with Kajima, and he did not own 10 percent of his law firm. Cartwright had, if anything at all, at most a "remote interest" in Temple Beaudry Partners being selected as the developer of the Belmont Learning Complex.

For these reasons, there is no violation of Government Code section 1090 involving David Cartwright or O'Melveny & Myers on these facts.

E. Political Reform Act Issues

Elements of an offense under the Political Reform Act (Government Code section 81000 et seq.). The Political Reform Act, Government Code section 81000 *et seq.*, prohibits financial conflicts of interest in contracts by government officials.[227] Section 87100 provides:

[227] The Political Reform Act also regulates campaign financing and spending, lobbyists, post-government employment, and gifts and honoraria involving government officials.

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a government decision in which he knows or has reason to know he has a financial interest.

Violators of the Political Reform Act are subject to criminal and civil enforcement actions. "Any person who knowingly or willfully violates any provision of this title is guilty of a misdemeanor."[228] Violation is punishable by imprisonment in county jail not exceeding six months.[229] A fine of up to $10,000 or three times the amount wrongfully received by the public officer per violation is provided.[230]

The Political Reform Act also establishes an extensive administrative enforcement procedure conducted by the California Fair Political Practices Commission ("Commission"). The Commission investigates complaints against public officials and has authority to convene formal hearings, receive evidence and impose discipline upon government officials, including cease and desist orders and fines of up to $5,000 per violation of the Act.[231] The standard of proof in administrative enforcement actions is a preponderance of the evidence.[232] The Political Reform Act is implemented through extensive regulations issued by the Fair Political Practices Commission., and the extensive duties and authority of the Commission, its published decisions, and its regulations are available at www.fppc.ca.gov.

Applicability to consultants. The Political Reform Act's conflict of interest provisions share the same policy objectives as Government Code section 1090. The basic conflict of interest rule provides:

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[228] Gov't Code § 91000(a).

[229] Gov't Code § 91000(a) makes violation of the Act a misdemeanor. Because no punishment is prescribed, Penal Code section 19 sets forth the misdemeanor penalty provisions for the violation.

[230] Gov't Code section 91000(b) provides: "In addition to other penalties provided by law, a fine of up to the greater of ten thousand dollars ($10,000) or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received may be imposed upon conviction for each violation."

[231] Gov't Code § 83116(c).

[232] 2 California Code of Regulations § 18361(e)(3).

> No public official at any level of state or local government may make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a disqualifying conflict of interest. A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his/her economic interests, unless the effect is indistinguishable form the effect on the public generally. A conflict of interest is disqualifying if the public official's participation is not legally required.[233]

In addition to public officers who directly enter into or approve contracts, the Political Reform Act also regulates consultants, salaried or unsalaried members of boards, and committees or commissions who make substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modifications by the government agency.[234] Under the Political Reform Act these individuals are deemed public officials and "decision makers."[235] These provisions extend the reach of the Political Reform Act, beyond that of the felony conflict of interest provisions of Government Code section 1090.

David Cartwright. The conflict of interest provisions of the Political Reform Act apply to consultants, including attorneys such as David Cartwright to the extent he was acting in the capacity as counselor to LAUSD during the development and construction of the Belmont Learning Complex project.

After concluding its investigation into the Belmont project, LAUSD's Office of the Inspector General lodged a complaint with the Fair Political Practices Commission against attorney Cartwright. That complaint alleged a conflict of interest violation of the Political Reform Act

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[233] 2 California Code of Regulations § 18700(a).

[234] Gov't Code § 82048, which provides:

> "Public official" means every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government. "Public official" also does not include members of the Board of Governors and designated employees of the State Bar of California, members of the Judicial Council, and members of the Commission on Judicial Performance, provided that they are subject to the provisions of Article 2.5 (commencing with Section 6035) of Chapter 4 of Division 3 of the Business and Professions Code as provided in Section 6038 of that article.

[235] 2 California Code of Regulations § 18701(a)(1)(C).

arising out of the fact that Cartwright and his law firm simultaneously represented LAUSD and Kajima International.[236] The Fair Practices Commission conducted an investigation into these allegations and concluded that David Cartwright was a public official subject to the statute. However, the Commission concluded that it was *not reasonably foreseeable* that LAUSD's decision to hire Kajima would produce any material benefit to the O'Melveny & Myers firm as a result of O'Melveny's relationship with Kajima.[237] Accordingly, the Commission determined that David Cartwright had *not* violated the conflict of interest provisions of the Political Reform Act. Enforcement action by the Commission was declined.[238]

The Commission's finding is substantially similar to the conclusion, detailed above, that David Cartwright had at most a "remote financial interest" in the BLC contract within the meaning of Government Code section 1090 *et seq*. As previously discussed, there was no expectation of profit or gain to David Cartwright or O'Melveny & Myers from the agreement. Moreover, there is no evidence that David Cartwright or his law firm realized any direct financial gain arising from the contract.

The District Attorney's Office concurs with the assessment of the Fair Political Practices Commission that the evidence in this matter does not establish a violation of the Political Reform Act.

F. Grand Theft Issues

Elements of the offense of grand theft. Grand theft, a violation of Penal Code section 487, is an alternate felony/misdemeanor punishable by up to 16 months, two years, or three years in the state prison.

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[236] Complaint filed by Special Counsel Roger Carrick. *See* letter from Fair Political Practices Commission Counsel Julia Bilaver to Don Mullinax, Inspector General, LAUSD (August 20, 2001).

[237] *In the Matter of David Cartwright* (August 20, 2001) FPPC No. 99/607.

[238] *Id.* It is important to note that in administrative enforcement actions by the Commission, the *burden of proof is the preponderance of the evidence,* not the much higher standard of beyond a reasonable doubt which would apply in a criminal prosecution. The Commission concluded it could not proceed even under the lesser standard.

Grand theft by false pretenses requires proof of the following elements:[239]

- A false pretense known to be false or made recklessly without information to justify a reasonable belief in its truth was made;
- The false pretense was made with a specific intent to defraud;
- The victim relied on the false pretense; and
- The victim parted with property.

Although not required to do so, if the victim conducts his or her own investigation and relies on such investigation rather than the false pretense, no theft by false pretenses has been committed.[240]

Alleged grand theft in the selection of Temple Beaudry Partners. It has been alleged that LAUSD project director Dominic Shambra, O'Melveny & Myers attorneys David Cartwright and Lisa Gooden, LAUSD consultant Wayne Wedin, and Ernst & Young accountants Robert Starkman and Steve Valenzuela, acting with intent to defraud, falsely overstated the merits of the Temple Beaudry Partners' proposal, while minimizing costs and environmental problems associated with that proposal. This theory suggests that, in reliance on those false representations, LAUSD parted with its property by first entering into an agreement for exclusive negotiation, and later entering into the Disposition and Development Agreement, all of which resulted in the payout of millions of

[239] CALJIC No. 14.10 provides:

> Every person who knowingly and designedly by any false or fraudulent representation or pretense, defrauds another person of money, labor, real or personal property, is guilty of the crime of theft by false pretense. In order to prove this crime, each of the following elements must be proved: 1. A person made or caused to be made to the alleged victim by word or conduct, either (a) a promise without intent to perform it, or (b) a false pretense or representation of an existing or past fact known to the person to be false or made recklessly and without information which would justify a reasonable belief in its truth; 2. The person made the pretense, representation or promise with the specific intent to defraud; 3. The pretense, representation or promise was believed and relied upon by the alleged victim and was material in inducing [him] [her] to part with [his] [her] money or property even though the false pretense, representation or promise was not the sole cause; and, 4. The theft was accomplished in that the alleged victim parted with [his] [her] money or property intending to transfer ownership thereof.

[240] CALJIC No. 14.11.

dollars on a project destined to cost far more than represented. However, the evidence is insufficient to establish these claims.

The selection of Temple Beaudry Partners as the Belmont Learning Complex developer and builder was a highly controversial and much debated LAUSD decision. Notwithstanding the controversy and the heated allegations arising from it, the evidence does not support a prosecution theory of grand theft by false pretenses. There were no provable false pretenses relied upon by LAUSD. LAUSD, the ostensible victim, utilized an Oversight Committee to conduct its own independent investigation and relied on the findings of that investigation, thus negating any arguable false pretense crime. And there is no provable specific intent to defraud on the part of any of the parties.

The various allegations of criminal misrepresentations in the selection process have generally focused on errors in the evaluation process, alleged failure to disclose the pre-existing relationship between O'Melveny & Myers and Kajima, failure to award the development contract to the lowest priced bidder, and the payment of developer fees. Those allegations of failures and misconduct are discussed below.

Evaluation Committee rating errors. It has been alleged that the Evaluation Committee ensured the selection of Temple Beaudry Partners through the use of misrepresentations. This allegation is based upon errors in the rating process used to evaluate the bidders and upon the firing of the Coopers & Lyband accounting firm.

The evidence establishes that the Evaluation Committee met on May 19, 1995, and rated the proposals submitted by Temple Beaudry Partners, CRSS/TELACU, and Goldrich-Kest & Associates. The Committee's combined scores were 89 points for Temple Beaudry Partners, 83 points for CRSS/TELACU, and 75 points for Goldrich-Kest.

In a June 9, 1995, memorandum, Wayne Wedin recommended that exclusive negotiations be conducted with Temple Beaudry Partners. Dominic Shambra included as part of that memorandum an Overall Matrix Summary using a different calculation formula than the point system that the Committee had used on May 19, 1995. Although the numbers in the three categories were correctly multiplied, when the results were added, a 100-point computational error was made in Temple Beaudry Partners' favor. This information was given to the Board on September 18, 1995, and some members of the Committee made presentations. While the error favored Temple Beaudry Partners, the relatively obvious nature of the 100-point computational error belies a claim of intentional deception. More significantly, even discounting the 100-point error, Temple Beaudry

Partners was still rated 40 points ahead of its nearest competitor, CRSS/TELACU. Thus it would be unreasonable to conclude the Board relied to its detriment on an obvious arithmetic error which did not change the relative positions of the bidding parties.

On June 7, 1995, accountant Steve Valenzuela wrote a letter to Wayne Wedin, and included an exhibit which purported to set forth the projected economic benefits to the District from the non-school, or retail portion, of the three proposals that had been considered before the vote on May 19, 1995. Subsequent analysis of the projected economic benefits disclosed that it contained four errors in the contingent revenue projections. Those errors were made by a low-level analyst at Ernst & Young/Leventhal, and not by anyone on the Evaluation Committee. As a result of those errors, the twenty-year contingent revenue projection for Temple Beaudry Partners' proposal was overstated by $20 million.

However, the evidence does not establish that a false statement in this connection was made by anyone with the requisite specific intent to defraud. In addition, the evidence shows that the alleged victim, the LAUSD Board, did not rely on any of the alleged false statements at the time the Board entered into the Disposition and Development Agreement with Temple Beaudry Partners. The Evaluation Committee's analysis was merely a recommendation to the Board to enter into exclusive negotiations with Temple Beaudry Partners.

Further, the Board, as a condition of engaging in exclusive negotiations with Temple Beaudry Partners, required an outside monitoring and evaluation team to oversee the negotiations. At the Board's direction, Roger Rasmussen, head of the LAUSD Independent Analysis Unit, formed a committee of experts. This Belmont Oversight Committee met many times after it was formed on November 20, 1995. The Committee members also met with District staff, members of the negotiation team, and members of the Board.

During the Oversight Committee's meetings, the computational errors regarding the contingent revenues were discovered and extensively discussed. The Oversight Committee came to the conclusion that the retail component was doubtful, but decided to recommend to the Board that the Disposition and Development Agreement be adopted. The Chairman of the Committee, Dr. Blakely, told the Board at its April 14, 1997, meeting, that the retail component was feasible, but needed additional work. The Disposition and Development Agreement expressed the same state of affairs, and specifically provided that the District would approve the retail component only upon delivery by Temple Beaudry Partners of an economically feasible plan.[241] The Board did not vote

[241] Disposition and Development Agreement section 1.1 (iii); 1.6 (b); 1.8 (b); 2.1.

to enter into the Disposition and Development Agreement until April 21, 1997, well after all these issues were discovered and extensively discussed.

The above computational and accounting errors are insufficient to support a prosecution for theft by false pretenses. There is no evidence that the errors were made with the required intent to defraud, or that the Board relied upon the errors in reaching its decision to approve the Disposition and Development Agreement — both of which would be essential elements of a grade theft case in this regard.

Kajima and O'Melveny & Myers. It has been alleged that the Belmont contract award was obtained by Kajima using false pretenses, and that if the true facts had been known to LAUSD, the contract would not have been awarded to Temple Beaudry Partners, of which Kajima was principal partner. It is claimed that a material aspect of that contract award process, consisting of an alleged conflict of interest between attorney David Cartwright representing the LAUSD and David Cartwright's firm O'Melveny & Myers representing Kajima on unrelated matters, was not disclosed. The evidence does not support these allegations.

As described above, attorney Cartwright, a partner in the O'Melveny & Myers law firm at the time he represented LAUSD on the BLC project, was involved in the negotiations for the purchase of a large part of the site. After the Request For Qualifications was issued and Temple Beaudry Partners submitted their proposal, David Cartwright learned that one of the Temple Beaudry Partners was a Kajima entity. Acting on his knowledge that O'Melveny & Myers was representing Kajima on other matters, Cartwright immediately informed LAUSD General Counsel Richard Mason of a potential conflict. David Cartwright himself had never represented Kajima or any of its entities, and the O'Melveny attorneys who had, did not work out of the O'Melveny office in Century City where Cartwright worked.

On April 6, 1995, before the Evaluation Committee met to rate the respondent's proposals, Cartwright wrote a letter to Richard Mason setting forth this potential conflict. On September 15, 1995, David Cartwright wrote another letter to Richard Mason setting forth the potential conflict. On September 18, 1995, a Board meeting was convened to consider whether to adopt the Evaluation Committee's recommendation to select Temple Beaudry Partners as the developer with which to enter into exclusive negotiations for the Belmont project. Cartwright told the Board about the potential conflict and that he would said that he would resign from the project if requested by the Board. Notwithstanding this disclosure, the Board voted to enter into exclusive negotiations with Temple Beaudry Partners, and shortly thereafter voted in closed session to waive any potential conflict regarding O'Melveny & Myers and the BLC project.

The potential conflict of interest regarding Kajima and O'Melveny & Myers cannot be claimed to have been a false pretense because LAUSD General Counsel Richard Mason was informed of that potential conflict on numerous occasions. In addition, the Board itself was notified of the potential conflict on September 18, 1995, and again on April 14, 1997, seven days before the Board approved the Disposition and Development Agreement. Last and most significant, a fully informed Board voted to waive the potential conflict in this connection.

Environmental issues as alleged false pretenses. It has also been suggested that various environmental concerns known to exist at the site were hidden from the Board in order to ensure Board approval of the Temple Beaudry Partners project proposal. It is asserted that as part of this alleged deception, a $2 million environmental mitigation allowance was removed from the budget proposal. However, the evidence does not support a prosecution for theft by false pretenses based on such a theory.

As described in detail in Chapter IV of this report, an exhaustive review of the facts, including the results of extensive testing, fails to find support for the claim of environmental hazards at the site aside from naturally occurring methane and hydrogen sulfide gas. As concluded above, there is insufficient evidence to support prosecutions for violations of environmental laws arising from the excavation, grading, and construction at the BLC site. A false pretenses theory based on failure to warn of hazardous wastes or other serious environmental problems cannot be sustained on these facts.

In fact, to the extent that legitimate environmental concerns arose, the Board was apprised during the early stages of the development process of the potential for such concerns and the alternatives for resolving them. For example, the Board considered the issue of methane gas when it approved the environmental impact report in November of 1996. Because of the uncertainty in accurately determining in advance the scope and costs of these potential environmental problems, the LAUSD adopted a well-precedented strategy of mitigating the problems as needed during construction.

In this connection, the LAUSD staff, and the persons responsible for negotiating and drafting the Disposition and Development Agreement, saw to it that LAUSD assumed responsibility for any such potential environmental mitigation costs. There were valid business reasons for doing so. Under such a strategy, LAUSD would be able to monitor and control the mitigation costs and would be able to ensure that the mitigation measures were effective. Even assuming that Temple Beaudry Partners, or any developer, could be induced to guarantee the cost of unknown possible environmental problems, such a guarantee would have been prohibitively expensive. This conscious strategy of mitigation-as-needed — a strategy used in other similar construction projects in

California — does not itself constitute criminal conduct by LAUSD and will not support prosecution of those who advised such a course.

It is true that the LAUSD Board decided during the negotiations leading to the Disposition and Development Agreement that LAUSD would be responsible for the possible environmental mitigation costs, and thus the $2 million allowance for that purpose was removed from the Temple Beaudry Partners' preliminary budget estimate of costs subject to the Guaranteed Maximum Price contract limit. However, this aspect of the budgetary process was monitored by the LAUSD Negotiating Team and the Oversight Committee, and was approved by a fully-informed Board.

The evidence fails to establish the requisite false pretense regarding environmental conditions relied upon by the Board in awarding the Belmont Learning Complex contract to Temple Beaudry Partners. Thus there is no basis for a theft by false pretenses prosecution arising out of alleged misrepresentations of environmental conditions.

Lowest responsible bidder requirements. On March 21, 1994, the Board authorized a Request For Qualifications/Request For Proposal process to select a developer to build the Belmont project. The Request For Proposal process was not designed to be a price competition. The Board sought instead to pursue a somewhat innovative approach to building the project within the State allowable limits for the school construction. The Board decided that a joint-use project with the private sector, incorporating retail and an affordable housing components, might benefit the District in helping to pay for the school.

Temple Beaudry Partners' proposal was not the lowest-cost proposal. Its project design and scope of work were different from the design and scope of work of the other two respondents. On September 18, 1995, the Board voted to enter into exclusive negotiations with Temple Beaudry Partners, and on April 21, 1997, voted to enter into the Disposition and Development Agreement with Temple Beaudry Partners to develop the Belmont project.

The facts establish that LAUSD used a Request For Qualifications/Request For Proposal process to select the developer, and did not follow Public Contract Code section 20111 requirement of selection of the lowest responsible bidder. However, even assuming a violation, Public Contract Code section 20111 does not carry any criminal penalty. And more important in this connection, at least three provisions of the Education Code provide exceptions to the Public Contract Code

requirement which justify the LAUSD procedure here.[242] No theft occurred when the project contract was awarded to a bidder which did not offer the lowest price.

Developer fees. The Disposition and Development Agreement approved by the Board contained a Guaranteed Maximum Price that included Developer and Completion Guarantee fees. The Disposition and Development Agreement approved by the Board on April 21, 1997, contained a Guaranteed Maximum Price for the school portion of the project of $85,875,800. Included within that guaranteed price were a developer fee of $3,262,500 and a completion guarantee fee of $1,600,000.

The Board members asked many questions about these issues in Board meetings regarding the Disposition and Development Agreement. The Oversight Committee discussed developer fees in great detail at several meetings during the negotiation process. Strenuous objections to fees were made known to the Oversight Committee members, to LAUSD staff, to LAUSD consultants, and to the Board. As a result of those objections, the issues were addressed during the negotiation period to the apparent satisfaction of both the Oversight Committee and the Board.

Presentations to the Board, as well as the Disposition and Development Agreement itself, made it clear that the Disposition and Development Agreement contractually bound Temple Beaudry Partners to construct the school portion of the project. The Disposition and Development Agreement further required TBP to use its best efforts to finalize and submit to LAUSD an economically feasible retail component, which was required to include an allocation of joint infrastructure costs applicable to that component. The Disposition and Development Agreement provided that the retail component needed further approval of the District, and the District could use the space within the school designated for retail for other District purposes if TBP's retail proposal was not acceptable to the District. The Disposition and Development Agreement provided that the affordable housing required a separate Disposition and Development Agreement. The Disposition and Development Agreement designated the Joint Powers use as a contingency.

Inclusion of developer fees and a completion guarantee does not show the commission of any crime. Although the Board initially hoped that retail and affordable housing would be a part of the Belmont Learning Complex, Board members were told at least twice in open session before the Board approved the Disposition and Development Agreement that those components might not be

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[242] *See Day Higuchi, et al. v. LAUSD, et al.*, *supra* note 192, which found that the Disposition and Development Agreement provisions came within the Education Code, not the Public Contract Code.

economically feasible. The Disposition and Development Agreement itself, which was considered by the Board, also makes this clear. The Board decided to enter into the Disposition and Development Agreement knowing these facts. No crime of false pretenses or otherwise was committed merely because the Board chose to pay those fees under the terms and conditions set forth in the Disposition and Development Agreement.

G. Public Contract Code Issues

Public Contract Code section 20111 requires selection of the lowest responsible bidder in specified public contracts, but provides no criminal penalty for its non-compliance. Even if there were such a violation on these facts, the failure to comply with section 20111 is not a crime, and violation of section 20111 cannot be a basis for a criminal prosecution.[243]

But there is also insufficient proof of such a violation. In the BLC-related civil litigation of *Higuchi, et al. v. LAUSD, et al.,* the Los Angeles Superior Court has held that the Board was not required by section 20111 to select the lowest responsible bidder.[244] Although Temple Beaudry Partners' initial proposed price of $99 million was significantly higher than the competitors, its proposal was also fundamentally different. LAUSD neither sought nor expected a direct price competition, nor was it required by law to do so, and the absence of such a process cannot provide a theory for criminal prosecution on these facts.

H. Conclusion

An exhaustive evaluation of the allegations of illegal conduct in the process of selecting Temple Beaudry Partners to develop the Belmont Learning Complex reveals there are fundamental and insuperable legal flaws in each of the theories of misconduct which have been advanced, including bribery, conflicts of interest, violations of the Fair Political Practices Act, and grand theft by false pretenses. Absent evidence which supplies the requisite proof elements missing in these facts, no criminal prosecution on these theories is possible.

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[243] Penal Code § 15, discussed in Chapter III of this report, *supra*.

[244] *Supra* note 192.

Chapter VII

SECURITIES LAW ISSUES

Chapter Synopsis

- Allegations of securities violations in connection with the offering and sale of the BLC Certificates of Participation cannot be supported by the evidence presented.
- LAUSD was fully committed to preserving the tax-exempt status of these COPs — and has in fact preserved that status — and nothing in LAUSD's consideration of possible retail uses of the site meets the test of material omission under state law.
- Environmental concerns about the BLC site also would not qualify as material omissions to the COPs investors, who were protected by payments and properties completely separate from the success or failure of the BLC project.
- There is no satisfactory evidence of the requisite fraudulent knowledge or criminal negligence on the part of any individual associated with the securities offering to support felony securities fraud charges.

A. Introduction

On December 1, 1997, LAUSD issued $91,400,000 worth of securities, called "Certificates of Participation" (COPs), to finance the development and construction of the Belmont Learning Complex. The District Attorney's Office has examined whether the issuance of those securities violated California corporate securities law and particularly Corporations Code section 25401 (untrue or misleading statements or omissions in sales of securities). At issue is whether LAUSD or individuals who issued those securities knowingly misled, or conspired to mislead, investors by either making untrue statements concerning material facts or omitting material facts that reasonable investors would consider important in making their investment decision.

The District Attorney's Office concludes that the existing evidence is insufficient to charge any violation of Corporations Code section 25401 in connection with the sale or offer of these securities.

B. Corporations Code section 25401 and its Requirements

Corporations Code section 25401 provides:

> It is unlawful…to offer or sell a security in this state…by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Materiality requirement. While no California criminal case specifically construes the term "material" for purposes of Corporations Code section 25401, the California court of appeal has addressed this issue in a civil context. In *Insurance Underwriters Clearing House, Inc. v. Natomas Co.*,[245] the court of appeal concluded:

> Under the Federal Securities Act of 1933, [a] fact is material if there is a substantial likelihood that, under all of the circumstances, a reasonable investor would consider it important in reaching an investment decision. [Citation] … The test of materiality under the California Corporations Code is the same.

Thus, the test for materiality is whether an objective "reasonable" investor would consider the misrepresentation or omission important in making an investment decision, and not whether a particular investor would subjectively consider it important.

Mental state: Actual knowledge or criminal negligence in failing to discover. Section 24501 also requires proof of a specific mental state on the part of the accused. In *People v. Simon*,[246] the California Supreme Court held: "We conclude therefore that *knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover* them, are elements of the criminal offense described in section

[245] (1986) 184 Cal.App.3d 1526.

[246] (1995) 9 Cal.4th 493.

25401."[247] Further, the *Simon* Court concluded that the requisite mental state must exist at the time of the sale. "The truth or falsity of a representation and the materiality of an omission must be determined on the basis of what the seller knew or should have known at the time of the sale."[248]

Thus, to obtain a conviction under Corporations Code section 25401, the prosecution must establish beyond a reasonable doubt actual knowledge of, or criminal negligence in failing to investigate and discover, the falsity or misleading nature of a statement or material omission at the time of the sale.

C. Relevant Factual Background

Certificates of Participation. The securities issued by LAUSD to finance the construction of the Belmont Learning Complex project were known as Certificates of Participation or "COPs." Certificates of Participation, a financing device akin to bonds, are frequently utilized by school districts to raise capital for school construction.[249] Unlike typical school bonds, Certificates of Participation are not subject to the constraints and limitations of voter approval. The COPs securities here were actually partial ownership interests in leases on eight LAUSD schools *other than Belmont*.[250] In the event of a default, the investors had recourse against those eight other

[247] *Id.* at 522 (emphasis added).

[248] *Id.* at 523.

[249] Certificates of Participation are a municipal revenue device created after the 1978 passage of Proposition 13, which required that bonds be passed by a 2/3 majority of the voters. Certificates of Participation are not "bonds" or "debt" as defined by the California Constitution, but rather are *leases* on real property, such as schools, issued by a governmental landowner. The government assigns the leases to a third-party lessor, who then leases the property back to the government for its continued use. The financial institution holding equitable title on the leased property sells the Certificates of Participation interests to investors and the sale proceeds go to the government. The government's monthly obligation to pay on the lease is paid to investors. Voter approval is *not* required because the obligation is not considered as "debt." The agreement is for a term of years, usually five, ten, fifteen, or twenty. The leases are marketed by a financial broker, such as Merrill Lynch, which broker sells the Certificates of Participation (or *lease* shares) on the open market. Municipal governments frequently issue Certificates of Participation to finance the construction of roads, hospitals, jails, public buildings and other local capital improvements. In the 1980s and 1990s, LAUSD raised millions of dollars through the sale of Certificates of Participation to finance the construction of the Bravo Medical Magnet High School and the King Drew Medical Magnet High School. Certificates of Participation are a preferred financing method over commercial loans because the government can issue the securities at an interest rate comparable to that of municipal bonds. The effective interest rate is generally many points lower than that of a commercial loan.

[250] The eight LAUSD schools that were the subject of the Certificates of Participation and the term of the leases are: Birmingham High School, Van Nuys; Dodson Junior High School, San Pedro; Eagle Rock High School, Los Angeles;

schools, *but not Belmont.* The appraised value of the schools ($109,289,000) exceeded the total value of the issued Certificates of Participation. Regular "lease" payments due the investors under the Certificates of Participation would come from the LAUSD General Fund. Significantly, those regular payments were not dependent on the success of the Belmont Learning Complex project, and despite Belmont's interruption, LAUSD has made all payments due the investors.[251] The Certificates of Participation securities continue to be marketable and no investor has lost his or her investment.

Tax-exempt status. Properly issued school district Certificates of Participation have tax-exempt status. This tax-exempt status makes the securities attractive to investors. Internal Revenue Service regulations required that in order to maintain that tax-exempt status, no more than $5 million dollars or 5% of the Certificates of Participation proceeds could be used for non-governmental purposes such as those contemplated under the "retail" component of the Belmont Learning Complex "mixed-use" concept. O'Melveny & Myers and outside bond counsel Orrick, Herrington and Sutcliff each provided opinion letters that, based on LAUSD's plans, the Certificates of Participation securities would be tax-exempt.

On September 28, 2001, the IRS issued a preliminary finding letter disallowing the tax-exempt status of the Certificates of Participation. That preliminary disallowance appears to have been based on information and conclusions taken primarily from the 1998 Joint Legislative Audit Committee (JLAC) report prepared under the supervision of then California State Assemblyman Scott Wildman. The JLAC report was highly critical of the Belmont Learning Complex project and alleged project fraud and malfeasance. At this time the IRS concluded there was no reasonable expectation LAUSD would complete the project in the manner stated in the official statement.

However, on September 24, 2002, LAUSD announced that it had successfully negotiated a closing agreement with the IRS, under which agreement the IRS would terminate its investigation without enforcement action. The agreement provides that "the IRS will not challenge the tax-exempt status of the certificates of participation, and the District will report to the IRS information relating

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Gardena High School and Moneta Adult School, Gardena; Ulysses S. Grant High School, Van Nuys; Marina Del Rey Junior High School and Marina Children's Center, Los Angeles; William Howard Taft High School, Woodland Hills; and Virgil Junior High School, Los Angeles. (Certificates of Participation Official Statement, page 27.)

[251] The Official Statement provides at page 28 that:

> "The [Belmont Learning] Complex is not subject to the Lease and does not provide security for repayment of the Certificates."

to the use and occupancy of the complex."[252] Thus, the tax-exempt status of the COPs is no longer in dispute.

Chronology of events. The development/construction contract to build the "school" component of the Belmont Learning Complex project was signed on April 30,1997. A central feature of the intended BLC design had been its "mixed use" capability wherein a high school, retail stores, affordable housing, and shared recreational and child care facilities were incorporated into one single project. Hence the name "Belmont Learning Complex" and not "Belmont High School." However, the other non-school aspects of the intended project were never developed.

The topography at Belmont is hilly, with a significant drop of elevation at the corner of First Street and Beaudry Street. To achieve a level building surface for the main school, a concrete platform or "podium" was constructed to level the slope. Initially, LAUSD planned to rent the space under the podium for retail business purposes. The motive behind this retail development was a desire by LAUSD for the school to help pay for itself, with lease payments from the commercial tenants as a source of revenue to help defray the costs of the school. The school was to be situated on top of a concrete structure that also housed the intended retail space. The concrete structure served both a school purpose in leveling the campus and a potential retail purpose by comprising the structural shell for the proposed retail space.

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[252] LAUSD News Release #02/03-049 (September 24, 2002). The full text of the release is as follows:

> The Internal Revenue Service has agreed to close its examination of the Los Angeles Unified School District's 1997 certificates of participation issued to build the Belmont Learning Complex. Under a closing agreement between the IRS and the District, the IRS will not challenge the tax-exempt status of the certificates of participation, and the District will report to the IRS information relating to the use and occupancy of the complex. Construction of the complex began in 1997 and was stopped in 1999 as a result of concerns raised about environmental conditions at the site.
>
> During the early development of the complex, consideration was given to commercial occupancy of portions of the complex. This raised concerns with the IRS. While the closing agreement acknowledges the IRS's legitimate concerns about potential private business use of the complex, which prompted it to initiate its examination of the certificates of participation, it also recognized that the District never entered into a binding agreement resulting in a private business use of the complex. The agreement reflects the IRS's recognition that the complex furthers and essential governmental purpose of the District.
>
> In March 2002, the District Board of Education authorized the Superintendent to pursue the completion of the complex. The District will ensure that the use of the complex will adhere to the federal tax rules governing bond financings.

At the time the school Disposition and Development Agreement was signed, the viability of the retail component of the overall project was highly uncertain. For LAUSD, the retail component depended upon its potential profitability and independent commercial feasibility.[253] Since the retail use was still unsettled, the school Disposition and Development Agreement signed in April 1997 contained an equitable adjustment contingency (estimated at $6–7 million) to be added to the school contract Guaranteed Maximum Price payable by LAUSD if the retail component of the project did not materialize. At the same time, the developer's leasing agent was estimating retail construction costs at approximately $12 million for purposes of calculating the return on investment projections submitted to LAUSD to determine whether to go forward with the retail component.

On June 4, 1999, the developer tendered a change order to LAUSD after the podium was completed, revising the $6–7 million estimate in the Disposition and Development Agreement to $9.3 million. This change order was not approved and not signed by LAUSD.[254] If not used for retail purposes, the space which had been planned for retail use could instead be used for school administrative offices, storage, or other government-related uses.[255]

Actual construction of the complex began in September 1997. At the time construction commenced, all of the then-documented environmental problems associated with soil gases and potential subsurface contamination on the site (as indicated in previous environmental reports) had been addressed in the design and planning of the complex. However, during excavation in late 1997,

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[253] The Disposition and Development Agreement, signed on April 30, 1997, provides in section 1.1(b)(iii) that:

> The Retail Component is subject to further review, adjustment and variation by reason of (1) the availability of financing, (2) leasing comments, (3) zoning requirements of the City of Los Angeles and (4) other economic feasibility measures.
>
> [N]o development of the Retail Component shall commence until LAUSD has approved the specifics of the Retail Component and the Retail Amendment has been executed by both parties.

[254] The added cost to LAUSD to construct the podium as part of the school Disposition and Development Agreement without a separate retail component going forward has never been resolved between LAUSD and Temple Beaudry Partners/Turner/Kajima. The Guaranteed Maximum Price for the school had not been reached when the project was abandoned for environmental reasons in January 2000 by LAUSD. As a result, the question never directly presented itself because the subcontractors who worked on the podium completed their work during the first part of the project. However, the effect of those added costs was imminent in June 1999, hence Turner/Kajima's $9.3 million tendered change order.

[255] LAUSD internal memos discuss alternative school based uses for the area as early as 1996.

methane gas and hydrogen sulfide gases, as well as oil-impacted soils and oil tanks, were detected at the site, although the full nature and extent of those environmental factors were not known at the time.

On December 1, 1997, two months after construction began, appropriate legal and financial professionals issued $91.4 million in LAUSD Certificates of Participation to raise funds for the development and construction of BLC. Merrill Lynch & Co. led six underwriters in handling that issuance. A 43-page investor disclosure statement accompanied the offering. Contract documents in excess of 900 pages set forth the duties and responsibilities of the parties involved in the offering.

Nowhere in the offering statement was there a disclosure to investors of the potential environmental problems affecting the BLC site. Although the possible retail option inherent in the BLC project design was disclosed, the statement represented that the retail component, if built, would be privately financed.

LAUSD financial and legal personnel, as well as LAUSD outside counsel, were aware of the non-governmental use limitation necessary to maintain the tax-exempt status of the Certificates of Participation. A letter from LAUSD development director Dominic Shambra to the outside bond counsel sought an opinion as to the potential effect of the intended retail development on the tax-exempt status of the Certificates of Participation. Memos from the LAUSD Chief Financial Officer after the date of issuance of the COPs warned that the space should only be used for governmental purposes to avoid jeopardizing the tax-exempt status, or alternatively proposed that any retail lessees should pay their proportional share of the construction costs associated with their space. While, commercial realities appear to have made retail development problematic, nevertheless the developer continued to pursue possible retail users. No retail plan was ever approved by LAUSD.

Construction continued in accordance with the original design. That design included additional parking, loading docks, pillar placement, utility capabilities, and a conditional use permit, all of which were consistent with retail use of the space under the school, but were probably not necessary for school administrative offices, school storage, or other governmental uses. Construction costs attributable *only* to the commercial retail capability of the space, and not also attributable the alternate permitted governmental uses, are not known.

Ultimately, LAUSD shut down the project in the fall of 1999 amid widespread publicity about environmental conditions at the site. However, despite the BLC project shutdown, LAUSD has continued to make all interest payments due under the Certificates of Participation. The Certificates of Participation continue to be marketable and, after the recent resolution of IRS concerns in this regard, the COPs continue to enjoy tax-exempt status. No investor has lost his or

her investment. However, at least one institutional investor, T. Rowe Price, sold its Certificates of Participation securities when it learned of the environmental problems associated with the Belmont Learning Complex project. T. Rowe Price asserts the Certificates of Participation were sold because certain of its investors would be dissatisfied with an environmental "taint" the Certificates of Participation would impart to the portfolio. Other investors have stated that they would have considered the environmental problems and possible loss of tax-exempt status to be significant in making their investment decision.

D. Legal Analysis

The allegations of omissions of material facts. In order to prove a violation of Corporations Code section 25401, it must be shown that the offeror made a material misrepresentation to the Certificate of Participation investors, or omitted a material fact necessary to make statements made to investors not misleading.

The official offering statement for the COPs stated: "In addition, the [Belmont Learning] Center may also include a retail component that may provide a major supermarket, a drugstore and a variety of neighborhood stores for local residents. If it is built, the retail component will be financed privately and not by the District."

At the time the original Certificates of Participation were issued in December 1997, LAUSD was still considering the possibility of a separate retail development/construction contract. If such a retail component was decided upon, it was the explicit and written position of LAUSD that the successful developer would have to supply the financing to pay for that retail component. LAUSD intended to build the podium, which also comprised the structural shell of the potential retail space, regardless of whether the retail component went forward.

It has been suggested that if no retail developer financed the podium construction, but retail uses of the space under the podium went forward, then in such a scenario the Certificates of Participation proceeds might have been the funding source for some of the retail portion of the complex. In this theory, if this portion of the retail component was not privately financed, as the offering statement asserted it would be, this would jeopardize the tax-exempt status of the securities, and this potentiality would thus be a material fact which should have been disclosed to potential investors.

The offering also does not disclose any environmental concerns associated with the site. It has been suggested that failure to disclose environmental concerns was an omission of material fact in connection with the offering of the COPs securities.

We turn now to each of these possible theories of failure to disclose material facts to potential investors:

Representations regarding retail use. A misrepresentation or omission is material if "there is a substantial likelihood that, under all of the circumstances, a reasonable investor would consider it important in reaching an investment decision." A cloud over the tax-exempt status of a security is a matter that a reasonable investor would likely consider important in reaching his or her investment decision.

In the BLC matter, the LAUSD offering statement represented that any retail development would be privately financed. However, it has been suggested that a portion of the construction work associated, at least in part, with the retail aspect of the complex was to be financed with Certificates of Participation proceeds. This concern was sufficiently substantial to cause the IRS to open an investigation and issue an initial determination of disallowance, since superseded by the closing agreement described above.

The District Attorney's Office has examined whether there has been a material misrepresentation constituting a violation of Corporations Code section 25401 under circumstances where LAUSD has represented there would be no Certificates of Participation funding expended for the retail component of the project. A key issue for any potential criminal securities prosecution on these facts is whether Certificates of Participation proceeds were actually used improperly, or were intended to be so used, for retail purposes, notwithstanding the claims to the contrary in the offering statements.

A securities violation charge based on this question of the use of the COPs funds faces fundamental obstacles. First, the portion of the complex identified for possible retail purposes, and for which COPs funds were used, is the podium structure. And although this podium structure encloses space considered for possible retail use, the podium also serves a completely valid and independent school-related purpose of elevating the academies and leveling the campus. It cannot be demonstrated that the podium, built with COPs funds, was built *only* to accommodate retail uses. The podium structure was necessary whether or not retail uses were to be permitted.

Further, although it was clearly LAUSD's goal to develop a retail component, *if feasible*, the retail development was expressly acknowledged in the development contract and elsewhere to be uncertain and dependent on its commercial feasibility. Beginning in 1996, LAUSD was also contemplating non-retail school uses for the same space. The project was ultimately stopped — for

reasons unrelated to the retail potential — while the developer was still exploring the retail prospects and other alternatives. Of real significance here, no retail development contract with a retail developer was ever consummated by LAUSD because no commercially viable retail development was ever clearly identified as feasible. And as a result, no retail leases were signed, and this portion of the project was never determined to be workable.

To be sure, construction continued under the original plans, which plans were designed to accommodate the contingency of retail use. But LAUSD clearly wished to maintain the tax-exempt status of the COPs, and certainly had the resources to repay any possible excesses so as to remain in full compliance with IRS mandates in this regard. Even if not were never used for the first-choice retail purposes, the space beneath the podium at all times had a legitimate and appropriate alternative use for school administrative offices or other approved governmental purposes. LAUSD was actively contemplating these other governmental uses at the time the COPs were issued, and thus it cannot be proved that LAUSD concealed a decision to improperly use COPs funds for retail purposes.[256]

It has been suggested that retail uses were an integral part of the complex design. For example, for purposes of return on investment studies prepared by the developer for use by LAUSD, construction costs for the retail project component were estimated at approximately $12 million dollars, an amount clearly in excess of the IRS maximum for non-governmental use of the COPs proceeds. Under this view, the mere existence of a potential problem with the tax-exempt status should have been disclosed to potential investors.

However, there is an alternate explanation of this evidence that is at least equally plausible, and this would make it unlikely that a trier of fact would find a criminal securities violation here. The evidence points, at least equally, to the explanation that LAUSD did no more than follow a prudent strategy of exploring a variety of possible uses for the relevant space, with retail use as just one of these possible alternatives.

The facts associated with the Board's deliberations and the language of the development agreement support this interpretation. By December 1, 1997, LAUSD recognized that its hopes for supplemental retail cash flow to fund school operations might not be realistic. A number of concerns began to cast doubt on the retail use proposal, including the insufficiency of available space for an

[256] And, ultimately, in the absence of corporate securities fraud or other criminal wrongdoing, there is nothing giving rise to prosecution in a design and budgetary decision by LAUSD to use the space for one of its possible intended purposes (administrative offices or other school purposes) and not another (possible retail use).

anchor tenant such as a supermarket, the location, the proximity of thousands of teenage students, the opposition to liquor sales at the supermarket, and resistance from organized labor.

Thus, by the time of the offer of the COPs securities, LAUSD was already planning for possible alternative school-based uses for the podium area and had articulated this contingency in the Disposition and Development Agreement.[257] It is noteworthy that LAUSD had also hoped to build affordable housing, a community gymnasium and swimming pool, and a neighborhood child care facility, but those plans were also abandoned, largely because funding did not develop. LAUSD maintains that in much the same way the retail potentiality also failed and was also abandoned, and it could certainly defend these decisions as made in good faith and in no way inconsistent with the offering statements.

Of special importance, by the critical date of offering, the publicly-stated LAUSD position was that any future developer implementing an acceptable retail project *would have to first make payment for any retail share of the infrastructure in order to reimburse the Certificates of Participation, as set forth in the Disposition and Development Agreement.* This public position and the relevant written provision in the DDA are powerful evidence that LAUSD was committed to maintaining the tax-exempt status of its COPs securities. In light of these facts, it is difficult or impossible to view LAUSD's failure to disclose potential issues with the tax-exempt status as a criminal omission of material facts.

Based on all these facts and circumstances, reputable legal counsel reviewed the plan, assisted in the drafting of the offering statement, and provided the written legal opinion that the securities would have tax-exempt status. LAUSD and its agents could and did rely on this legal advice in offering the COPs securities, and this fact further undermines the viability of a charge of knowing or reckless omission of material fact in this regard.

Under these circumstances, the evidence is insufficient to establish the existence of a knowing or criminally negligent material omission relating to the tax-exempt status of the COPs securities.

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[257] Article 1.1(b)(iii) provides: "Until delivery by Temple Beaudry Partners to LAUSD of an economically feasible plan for the Retail Component (*i.e.*, a Retail Component satisfying the matters set forth in clauses (1) through (4) of the paragraph immediately above), LAUSD reserves the right to consider alternatives for the Retail Component (including, without limitation, development and uses of such portion of the Site for LAUSD's own purposes)."

Representations regarding environmental issues. Similarly, the issue of possible omissions regarding environmental concerns at the BLC site will not adequately support a securities fraud charge.

A first obstacle to such a charge is the issue of materiality of the environmental questions as regards the sale of the COPs. Regular payments owed to Certificates of Participation investors by LAUSD *did not depend on the success of the BLC project*, but instead came from other unrelated operations and sources of income. And in the event of a possible default by LAUSD, the investors had *no recourse against the Belmont site*, but rather were fully secured by the eight other schools whose value exceeded the total Certificates of Participation offering amount. Investors in the COPs had no reasonable concern over how LAUSD spent the COPs proceeds (provided that the use of the funds did not compromise the tax-exempt status of the COPs, see discussion above). For these reasons, any potential BLC environmental problems were not objectively important to a reasonable investor in the COPs and the failure to disclose any such problems was not material within the meaning of the law.[258]

Finally, assuming that the failure to disclose an environmental problem at Belmont could ever be material, that materiality would also likely depend on the magnitude of the environmental problem. Nondisclosure of a readily remedied environmental problem would probably not be material. And although methane and hydrogen sulfide gases were discovered during excavation, the full nature and extent of those soil gases were unknown at the time of the issuance of the Certificates of Participation. Failure to speculate about what were believed to be minor environmental problems would not form the basis for a successful felony prosecution for securities fraud.

As described in Chapter IV above, environmental concerns exist at the BLC site, as with many areas of Southern California associated with oil fields. However, credible experts believe these problems can be readily addressed using accepted mitigation systems. The failure to disclose mitigable environmental problems to investors — especially when those investors were looking not

[258] It is possible to construct a theory that environmental issues might be relevant to some investors, in that there is in some cases commercial attractiveness for "green" investments which are perceived to be socially responsible. Some support for such a theory might be found in the decision by T. Rowe Price to sell its LAUSD COPs investments because of a concern that the environmental issues cast a shadow over its portfolio. However, the evidence indicates that the environmental concerns could be readily addressed with well-accepted mitigation strategies. Under these circumstances it would be difficult or impossible to convince a trier of fact that failure to disclose readily-solved soil problems equates to criminal fraud on COPs investors who, after all, had no direct interest in the success of the BLC project and were protected by other revenues and other properties.

to BLC but to other LAUSD operations and assets for payments and security — would almost certainly not be important in their investment decision and hence would not meet the legal standard for a material omission under California law.

Thus it is highly unlikely that this Office could prove beyond a reasonable doubt the requisite materiality of the alleged omissions on these facts.

Actual knowledge or criminal negligence in failing to discover. The existing evidence is also insufficient to establish the requisite actual knowledge at the time of issuance or criminal negligence in failing to discover on the part of LAUSD or any of the possible individual suspects.

For the purposes of a successful felony prosecution of an individual for a securities fraud offense, it is necessary to prove that the defendant or defendants had the specific state of mind required for a criminal securities violation by the Supreme Court in the *Simon* case, discussed above.[259]

In this case a governmental entity, the Los Angeles Unified School District, working in conjunction with well-respected legal and financial professionals, issued the COPs securities. The ultimate issuance was the end result of the work of a variety of individual officials and agents, and the existing evidence does not demonstrate the requisite *mens rea* on the part of any of these individuals.

For example, Henry Jones, LAUSD chief financial officer, was clearly involved in the process. However, the existing evidence is insufficient to establish that Henry Jones had actual knowledge at the time of issuance or acted with criminal negligence in failing to discover any purported misrepresentations in the offering statement, relating either to funding sources for the retail component or the true environmental conditions at the site. Jones would have relied, and reasonably so, on the legal and financial professionals who researched the issuance and drafted the offering statements. At the time, the retail development was highly uncertain, so neither Jones nor any other official could be said to be on notice that the COPs offering statement omitted material facts in this regard. And subsequent memos from Jones show an intention on his part that all retail construction costs be paid by non-Certificate of Participation proceeds, suggesting that he was in fact committed to preserving the accuracy of the offering statements concerning tax-exempt status.

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[259] *Supra* note 246.

Similarly, LAUSD development director Dominic Shambra would have likely known about potential retail construction funding sources and possible environmental problems at the site. However, the possible retail component was an innovative potential element in the project and a secret to no one. Correspondence between Shambra and outside bond counsel establishes an intention by Shambra that the offering be lawful and that the potential retail component not affect the intended tax-exempt status of the COPs. And the extent of the environmental concerns was far from clear at the time of issuance. Further, like others, Shambra would have relied, and reasonably so, on the legal and financial professionals to appropriately fashion the disclosure documents in conformance with state securities laws. Existing evidence is insufficient to prove beyond a reasonable doubt that Shambra knew, or was criminally negligent in failing to discover, any purported misrepresentations and omissions in the offering statements.

Finally, David Cartwright, O'Melveny & Myers partner and BLC legal consultant, was probably aware of the potential retail construction costs and possible environmental problems at the site. However, the Certificates of Participation issuance and disclosures were handled by the legal and financial bond professional experts and the LAUSD financial department. Existing evidence is insufficient to establish necessary knowledge or criminal negligence in failing to discover any purported misrepresentations or omissions in the offering statement on the part of Cartwright.

To date, none of the investors have lost money in the BLS Certificates of Participation investments. And with the recent closing of the IRS inquiry into the tax status of the COPs, there is little realistic prospect of harm to the interests of any investors in these securities.

E. Conclusion

The allegations of securities violations in connection with the offering and sale of the BLC Certificates of Participation cannot be supported by the evidence presented.

LAUSD was fully committed to preserving the tax-exempt status of these COPs — and has in fact preserved that status — and nothing in LAUSD's consideration of possible retail uses of the site meets the test of material omission under state law. Similarly, any environmental concerns about the BLC site were irrelevant and immaterial to the COPs investors, who were protected by payments and properties completely separate from the success or failure of the BLC project. And there is no satisfactory evidence of the requisite fraudulent knowledge or criminal negligence on the part of any individual associated with the securities offering to support felony securities fraud charges.

Chapter VIII

SUBCONTRACTOR BILLING ISSUES

Chapter Synopsis

- After an extensive hearing process raising these issues, an independent arbitrator has considered and rejected LAUSD's claims of subcontractor wrongdoing — including essentially all the overbilling or false claims allegations referred to this Office for prosecution. LAUSD's appeal has been dismissed and that decision is now final. A prosecution on these same theories under the more stringent criminal law requirements has no reasonable prospect of success.

- A review of the facts surrounding each claim of billing violations reveals that neither Turner Beaudry Partners, nor Turner/Kajima, nor the six subject subcontractors intentionally overbilled for work performed on the project. Instead, the arbitrator found that LAUSD's breach of contract and mishandling of the project shutdown were the principal sources of billing and payment problems.

- There is insufficient evidence of intentional overbilling or false claims to support criminal prosecution of any of the contractors or subcontractors in the BLC project.

A. Introduction

The District Attorney's Office has comprehensively reviewed the evidence for possible violations of Penal Code section 487 (grand theft) and Penal Code section 72 (false claims) arising out of alleged overbilling and filing of false claims by six subcontractors during the construction of the Belmont Learning Complex in the years 1997–1999.[260] This Office has examined and analyzed

[260] The six contractors referred by the Los Angeles Unified School District are: BMP Concrete; Downey Electric; Keenan, Hopkins, Suder & Stowell Contractors Drywall; Queen City Glass; Rucker Tile; and Winegardner Masonry.

contracts, pay applications, reports, and other documentary evidence generated by the Los Angeles Unified School District (LAUSD), developer Temple Beaudry Partners, general contractor Turner/Kajima, and the six subcontractors. Numerous witnesses have been interviewed and various construction experts have been consulted.

Investigation of the subcontractor billing issue. The Los Angeles Unified School District's Office of Internal Audit and Special Investigations Unit (later to become the Office of the Inspector General) referred allegations of subcontractor overbilling to the District Attorney's Office after the results of the IASI unit's investigation were published on December 13, 1999.[261] In its report, the LAUSD audit unit alleged that six subcontractors intentionally submitted inaccurate payment applications and thus overbilled the Los Angeles Unified School District by $2,080,148.[262]

Following release of this report, the Major Fraud Division of the District Attorney's Office investigated these allegations. The Major Fraud Division investigation concluded in December 2000 with a finding that there was insufficient evidence to charge any of the parties with a crime.

The Belmont Task Force of this Office has revisited the LAUSD audit unit's referral for possible criminal prosecution of these billing matters. The Task Force staff has interviewed or re-interviewed numerous witnesses, and documentary evidence has been gathered and examined or re-examined.

This Office has focused on three theories of prosecution for theft by false pretenses alleged to have occurred during construction of the Belmont Learning Complex. Those theories allege that:

- Subcontractors engaged in overbilling and front-loading of contracts;

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[261] *Report of Findings, Belmont Learning Complex, Part II* ("*IG Report II*").

[262] *IG Report II* noted that LAUSD's investigation results implicated the False Claims Act, Government Code section 12650 *et seq*., a civil remedy providing treble damages when a contractor *knowingly* presents a false claim for payment, such as front-loading or overbilling. Violation of the False Claims Act requires a lesser level of proof than is required to establish a criminal violation under Penal Code sections 72 or 487. The False Claims Act provides: "Proof of specific intent to defraud is not required." (Gov't Code § 126440(B)(2)(c).) In addition, the burden of proof is a *preponderance of the evidence,* not beyond a reasonable doubt. LAUSD asserted a False Claims Act violation against Turner/Kajima and the subcontractors in a civil arbitration proceeding. The arbitrator, however, found no evidence of a False Claims Act violation, of overbilling, or of any wrongful conduct on the part of the contractors. *See Temple Beaudry Partners, et al. v. Los Angeles Unified School District* (2001) 72 Y 115 004 18 000.

- Change orders were unlawfully passed through for payment to the Los Angeles Unified School District; and

- Contract allowances were unlawfully used to impermissibly spread costs over other line items in monthly pay applications.

Each of these theories is discussed below and analyzed for possible violations of Penal Code sections 72 and 487.

While some subcontractors have acknowledged that they may have front-loaded their contracts or submitted pay applications that were in error, the issue critical to any criminal prosecution is not whether the subcontractors submitted inaccurate pay applications, but whether they possessed a *specific intent to defraud* LAUSD, a necessary mental state required for a successful prosecution under Penal Code sections 72 or 487. *No such provable intent has been uncovered in this investigation.*

Subcontractor billing events leading to arbitration. In analyzing the billing activities of the Belmont subcontractors it is necessary to understand the context in which that billing occurred. Beginning in July 1999, LAUSD slowed down construction at the BLC site; then in November 1999, LAUSD suspended further work because of controversy over environmental conditions at the site. LAUSD told the project subcontractors to deliver all the materials to the site before shutting down the project. After shutting down the project, LAUSD raised allegations of overbilling and did not pay Temple Beaudry Partners, Turner/Kajima, or the subcontractors any of the monies that an arbitrator later concluded had been earned and were due.

Arbitration and appeal of these issues. LAUSD, Turner/Kajima, and the subcontractors have already litigated these issues — including issues of alleged false claims, overbilling, front-loading, change orders, and allowances — in a binding civil arbitration proceeding mandated by the terms of the contract. This arbitration hearing was conducted in Santa Monica from December 2000 through May 2001 and involved sworn testimony from witnesses and voluminous documentary evidence. During that hearing, LAUSD presented its false claims and overbilling case. Although the standard of proof, the procedures, and the forum differ from that of a criminal prosecution, the civil arbitration proceeding did involve an adversarial hearing conducted before a detached, impartial decision-maker. Thus the arbitration result provides insight into the possible outcome of a criminal prosecution based on the same or similar theories.

On June 7, 2001, the arbitrator issued a decision denying LAUSD's theory of fraud and overbilling on the part of Turner/Kajima and the subcontractors. The arbitrator found that LAUSD had materially breached the contract by abandoning the project and not paying for work performed. LAUSD was ordered to pay $17 million to the developer, architect, general contractor, and subcontractors.[263]

LAUSD appealed the arbitrator's decision in the California court of appeal.[264] Significantly, on August 7, 2002, the court of appeal dismissed LAUSD's appeal, rendering final the arbitrator's decision and award. As detailed further below, LAUSD has now paid in full the arbitrator's award of approximately $17 million.

Thus, our final analysis of these issues must include the fact that an independent trier of fact has already considered and rejected LAUSD's claims of subcontractor wrongdoing — including essentially all the claims referred to this Office for prosecution under the far more stringent requirements of the criminal process.

B. Grand Theft (Penal Code section 487) and False Claims (Penal Code section 72) and Their Requirements

The District Attorney's Office has considered possible violations of two statutes, Penal Code section 72[265] (which prohibits presenting a false claim to a government agency), and Penal Code

[263] *Temple Beaudry Partners v. LAUSD* (June 7, 2001) 72-Y-115-004-18-000, Opinion and Award of Arbitrator.

[264] *LAUSD v. Temple Beaudry Partners, et al*., California Court of Appeal, Second District, Case No. B154183.

[265] Penal Code section 72 provides:

> Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, city, or district board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is punishable either by imprisonment in the county jail for a period of not more than one year, by a fine of not exceeding one thousand dollars ($1,000), or by both such imprisonment and fine, or by imprisonment in the state prison, by a fine of not exceeding ten thousand dollars ($10,000), or by both such imprisonment and fine.

section 487[266] (grand theft). False claims is an alternative felon/misdemeanor crime[267] involving the filing of a false claim, bill, or writing for payment in any government contract. Grand theft, also an alternative felony/misdemeanor, is the theft of more than $400. Each of these crimes is premised on *theft by false pretenses*.[268]

Requirement of intent to defraud. Penal Code section 72 specifically includes intent to defraud as an element necessary to prove the crime of false claims. To support a conviction based on theft by false pretenses, "[I]t must be shown that the defendant made a false pretense or

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[266] Penal Code section 487 provides:

> Grand theft is theft committed in any of the following cases: (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400), except as provided in subdivision (b). (b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases: (1)(A) When domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding one hundred dollars ($100). (B) For the purposes of establishing that the value of avocados or citrus fruit under this paragraph exceeds one hundred dollars ($100), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft avocados or citrus fruit of the same variety and weight exceeded one hundred dollars ($100) in wholesale value. (2) When fish, shellfish, mollusks, crustaceans, kelp, algae, or other agricultural products are taken from a commercial or research operation which is producing that product, of a value exceeding one hundred dollars ($100). (3) Where the money, labor, or real or personal property is taken by a servant, agent, or employee from his or her principal or employer and aggregates four hundred dollars ($400) or more in any 12 consecutive month period. (c) When the property is taken from the person of another. (d) When the property taken is an automobile, firearm, horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow, or pig. (e) This section shall become operative on January 1, 1999.

[267] A crime punishable as a felony or misdemeanor (also known as a "wobbler").

[268] CALJIC No. 14.10 (6th ed. 1996) "Theft By False Pretense – Defined and Elements" provides:

> "Every person who knowingly and designedly by any false or fraudulent representation or pretense, defrauds another person of money, labor, real or personal property, is guilty of the crime of theft by false pretense. In order to prove this crime, each of the following elements must be proved: 1. A person made or caused to be made to the alleged victim by word or conduct, either (a) a promise without intent to perform it, or (b) a false pretense or representation of an existing or past fact known to the person to be false or made recklessly and without information which would justify a reasonable belief in its truth; 2. The person made the pretense, representation or promise with the specific intent to defraud; 3. The pretense, representation or promise was believed and relied upon by the alleged victim and was material in inducing [him] [her] to part with [his] [her] money or property even though the false pretense, representation or promise was not the sole cause; and 4. The theft was accomplished in that the alleged victim parted with [his] [her] money or property intending to transfer ownership thereof.

representation with *intent to defraud* the owner of his property, and that the owner was in fact defrauded, in that he or she relied on the false representation in parting with his or her property."[269]

Both grand theft under section 487 and false claims under section 72 have as a necessary element the *specific intent to defraud.* Conviction under either statute would require proof, *beyond a reasonable doubt*, that Turner/Kajima or the subcontractors intended to defraud LAUSD. Error, misunderstanding, mistake of fact, and even unreasonable but good faith belief in a right to payment, will not meet this standard.

Mental states such as intent to defraud are usually proved circumstantially. CALJIC No. 2.02 ("Sufficiency of Circumstantial Evidence to Prove Specific Intent") sets forth the legal standard by which circumstantial evidence must be analyzed in a criminal trial.[270] This standard raises a substantial barrier to a possible prosecution for false claims or grand theft in this matter. CALJIC 2.02 provides that if there is a reasonable non-criminal explanation for the circumstantial evidence, the fact-finder must accept that non-criminal explanation. A defendant may be found guilty *only if* the proven circumstances are not only: (1) consistent with the theory that the defendant had the required specific intent; but also (2) *cannot be reconciled with any other rational conclusion*.

As discussed below, the evidence establishes reasonable explanations for the pay applications submitted by the subcontractors during the Belmont project construction.

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[269] *People v. Randono* (1973) 32 Cal.App.3d 164, 172 (emphasis added).

[270] CALJIC No. 2.02 provides:

> The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count [s] _____, _____, _____ and _____], [or] [the crime[s] of _____, _____, _____, which [is a] [are] lesser crime[s]],] [or] [find the allegation _____ to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other its absence, you must adopt that interpretation which points its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

Defense of claim of right. California law recognizes the legal defense of "claim of right." Under this principle of law, persons who take property in the mistaken but honestly-held belief that they have the right to its possession, do not have a specific intent to steal, even if that honestly-held belief may be unreasonable under an objective standard.[271] Thus, if front-loaded pay applications or other forms of alleged overbilling were presented in an unreasonably mistaken — but honestly-held — belief in the right to do so, then the law concludes that those applications were not submitted with the requisite intent to defraud.

C. Factual Background

Development and construction of Belmont Learning Complex. The developer selected to design and build the Belmont Learning Complex (BLC) was Temple Beaudry Partners (TBP)[272]. LAUSD and Temple Beaudry Partners entered into a development and construction contract, the Disposition and Development Agreement, on April 30, 1997. The project was to be a "design-build" project, meaning that the BLC would be designed and built on an on-going basis as the project evolved. The "design-build" strategy was adopted because of perceived savings in both time and money.[273] An estimated time saving of two years was projected.

The BLC development and construction contract provided for a Guaranteed Maximum Price of $85,875,000.[274] In theory, the BLC project should have cost LAUSD no more than that maximum, but if built for less, LAUSD would have realized 85% of any cost savings.[275] In reality, the Guaranteed Maximum Price would likely rise because LAUSD was responsible for prospective environmental remediation and mitigation costs.[276] The Belmont Learning Complex was scheduled

[271] *See* Penal Code section 26.3 and *People v. Navarro* (1979) 99 Cal App.3d Supp.1.

[272] Temple Beaudry Partners general partners were Kajima Urban Development and Turner Construction Company. The developer's fee was $3,262,500. *See* Disposition and Development Agreement, Exhibit E.

[273] Disposition and Development Agreement, Recitals C.

[274] Disposition and Development Agreement, 1.5.1, Exhibit E.

[275] Disposition and Development Agreement, 1.5.4.

[276] Disposition and Development Agreement, 5.1–5.4. This includes any resulting delay costs.

for completion 27 months after ground breaking.[277] Students were due to be attending summer school in the year 2000.[278]

The Disposition and Development Agreement was the result of an 18-month negotiation between LAUSD owner and the Temple Beaudry Partners developer beginning in 1995.[279] LAUSD considered the agreement's guaranteed maximum price essential to protect LAUSD from run-away costs. The Disposition and Development Agreement provided that the Belmont project would cost LAUSD no more than the Guaranteed Maximum Price, and if the actual cost exceeded that price, those additional costs would be borne by TBP.[280] School officials, their lawyers, and consultants believed that actual development and building costs would meet or exceed the guaranteed maximum, and that LAUSD had negotiated a favorable deal in the Disposition and Development Agreement. Accordingly, LAUSD conceded there would be no "cost savings" or Guaranteed Maximum Price reduction for it to claim under the bid buy-out provisions of the Disposition and Development Agreement.

On August 11, 1997, Temple Beaudry Partners contracted with Turner/Kajima, a joint venture between Turner Construction Company and Kajima Construction Services. Turner/Kajima was to serve as the general contractor on the project.[281] As the general contractor, Turner/Kajima entered into subcontract agreements with 49 subcontractors who actually built the school. The subcontracts were fixed price contracts, meaning that an agreed-upon price was to be paid for a specific construction task or responsibility. The subcontractors were required to obtain a performance bond guaranteeing that their jobs would be finished for the specified contract price.[282]

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[277] Disposition and Development Agreement, Exhibit W.

[278] The completion deadline was extended because of litigation delays, El Nino rains, and environmental delays.

[279] *See* details of the bidder selection process in Chapter VI, *supra*.

[280] Los Angeles District Attorney's Office interviews of interviews of Roger Friermuth, former head of Facilities Services Division (July 11, 2001) and Dominic Shambra, former head of the Office of Planning and Development (August 7–8, 2001).

[281] Turner/Kajima's fee was to be 3% of each subcontractor's contract amount, payable from each submitted pay application. Temple Beaudry Partners/Turner/Kajima contract, Article 5.

[282] Turner/Kajima/subcontractor contracts.

Although LAUSD had an owner's representative at the construction site,[283] LAUSD had no direct contractual control over the subcontractors who were actually building the school.

Contractor billing process. The Disposition and Development Agreement between LAUSD owner and the TBP developer set forth a process by which the subcontractors were to receive progress payments during the course of their work[284] That process was duplicated in the TBP/Turner/Kajima general contract and in the contracts between Turner/Kajima and the various subcontractors.

In general, the subcontractors submitted pay applications to the general contractor, Turner/Kajima, for review and approval. Turner/Kajima would submit these pay applications to the developer, Temple Beaudry Partners, for review and approval. TBP, in turn, would submit the pay applications to the owner LAUSD. LAUSD, acting through Los Angeles County, then issued checks to TBP, which in turn issued checks to general contractor Turner/Kajima, which then paid the subcontractors. As a result of this cumbersome process, and the accounting practices of LAUSD once they received the pay applications, subcontractors often waited two to three months after submitting pay applications before receiving payment. This was a common occurrence despite the fact that the Disposition and Development Agreement specified that contractors were to be paid 30 days after the pay application was certified and submitted to LAUSD.[285]

The amount of each monthly progress payment application to LAUSD was based upon the subcontractors' estimates of work completed and materials brought to the site. On the 15th of the month, the project manager for each subcontractor would estimate the percentage of work that the subcontractor would likely complete by the end of the month for each line item on the schedule of values.[286] By the 20th of the month, Turner/Kajima's project manager, Mark Turner, compiled the payment applications and schedule of values for each of the 49 subcontractors. Mark Turner compared the estimated percentages of completion to his observation of the work in place. Thereafter, representatives from Temple Beaudry Partners, Turner/Kajima, the architect, and

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[283] Disposition and Development Agreement 1.12, 4.2. Daniel Mann, Johnson and Mendenhall were retained to serve as the owner's representative.

[284] Disposition and Development Agreement section 4.3.

[285] Disposition and Development Agreement, Exhibit Y.

[286] A schedule of values is a breakdown of the items of work incorporated into the Turner/Kajima /subcontractor contracts.

LAUSD[287], as well as an owner's official representative (Paul Hurley[288] from the nationally known construction management firm of Daniel Mann, Johnson and Mendenhall), and an outside construction consultant (Greg Kozeff[289] from the firm of Hanscomb, Inc.), met in a "pencil pay application" meeting to discuss whether the pay applications were an accurate forecast of the work to be in place by the end of the month. *The parties walked the job site to observe construction progress and the status of various line items listed in the pay applications*.

Pay applications were sent to LAUSD for payment only after a consensus was achieved on the estimates contained within the applications.[290] According to Mark Turner, such a consensus was important to Turner/Kajima, who had an interest in avoiding unnecessary delays in paying its subcontractors with their weekly payrolls and other cash flow requirements.[291] The process outlined above became well established among the parties over the course of construction. Prior to the July 1999 pay application (application no. 28), the process resulted in 27 previous pay applications being accepted, signed, and paid by LAUSD.[292] By July of 1999, it was estimated that the project was approximately 60% complete, was within the Guaranteed Maximum Price, and was scheduled for completion in June of 2000.[293]

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[287] LAUSD senior managers, including Roger Friermuth, Facilities Services Division and Ray Rodriguez, from the Office of Planning and Development attended every pencil pay application meeting. *See* LADA interviews of Paul Hurley, Roger Friermuth, and Paul Hurley. Roger Friermuth states that he took an active role in the meetings he attended and was satisfied that the progress payments were accurate.

[288] LAUSD's on site representative was Paul Hurley, an experienced construction architect with Daniel Mann, Johnson and Mendenhall. Paul Hurley's job was to monitor construction progress, communicate with Turner/Kajima, and check the accuracy of work completion estimates. Paul Hurley's role was critical because unless he signed off and certified the pay applications as correct, the pay applications would not be paid by LAUSD. (Disposition and Development Agreement section 4.3.)

[289] Hancomb, Inc. was retained by LAUSD to monitor construction, job progress, and monthly financial analysis and audit. Hanscomb, Inc. is a national construction-engineering firm.

[290] Turner/Kajima submitted the pay application, signed by Paul Hurley to Temple Beaudry Partners, who then submitted it to Roger Friermuth from LAUSD Facilities Services Division.

[291] Los Angeles District Attorney's Office interview of Mark Turner (October 31, 2001).

[292] Pay application 27, submitted in June 1999 was paid in October 1999. Pay application 28, submitted in July 1999, was partially paid on November 6, 2001, when LAUSD paid thirty of the subcontractors a total of $5,190,782. Of the subcontractors referred by LAUSD, Keenan, Hopkins, Suder & Stowell Contractors was paid $35,115, Rucker Tile $111,015, and Wingardner $1,007,388. BMP, Downey Electric, and Queen City Glass were paid in full after the August 7, 2002, dismissal of LAUSD's appeal.

[293] Estimate based on monthly Hanscomb reports.

In addition to the above monthly pay application meetings, there were also Owner, Developer, Architect, Contractor ("ODAC") meetings held at the site twice a month.[294] Roger Friermuth, Ray Rodriguez, Paul Hurley, and representatives from Temple Beaudry Partners, Turner/Kajima, the architect, and the firm of Smith Emery (another inspection consultant hired by LAUSD), attended these meetings. These regular, and often lengthy, meetings generated voluminous minutes that show that LAUSD was kept apprised of the construction progress at the site and that LAUSD's staff was aware of the building and billing issues.

Methane and hydrogen sulfide gas discovery. Methane and hydrogen sulfide gases were discovered south of Colton Street early in 1998.[295] On April 24, 1998, LAUSD contracted with Sepich Associates to design a methane control system for the impacted school buildings south of Colton Street. The design was completed on June 3, 1998. A design peer review was completed in September 1998. In October 1998, Sepich Associates, TBP, and LAUSD requested that the Los Angeles Fire Department review the design and issue permits as the Fire Department had done with the earlier Field House design north of Colton.

The discovery of methane and hydrogen sulfide gas south of Colton Street had a substantial impact on the construction process causing building design changes and increased construction costs. Temple Beaudry Partners and LAUSD continued with construction in an effort to avoid delay costs for which LAUSD would be responsible. No floor slabs were poured so as to permit later installation of the methane control systems.

The California Department of Toxic Substances Control began an environmental review of the Belmont Learning Complex on October 8, 1998, at the request of California State Assemblyman Scott Wildman.[296] On November 17, 1998, after examining various site and environmental reports, the California Department of Toxic Substances Control concluded that the site had not been properly

[294] Phil Koscielny and his team of inspectors signed off on all construction work at the Belmont Learning Complex. Smith Emery followed progress of the work and were aware of the work in place. *See* Los Angeles District Attorney's Office interview of Mark Turner (October 31, 2001).

[295] *See* discussion in Chapter IV of methane and hydrogen sulfide gases south of Colton Street and the development of the methane control systems.

[296] California Department of Toxic Substances Control letter to California State Assemblyman Scott Wildman (November 17, 1998).

characterized for possible environmental contamination. The Department of Toxic Substances Control called for further investigation.[297]

This Department of Toxic Substance Control action formalized the ongoing LAUSD policy of not laying any new concrete slabs under the school buildings subject to the installation of the methane control systems. Public controversy about the safety of the school led to increased pressure on LAUSD to stop construction pending more complete characterization of the site.[298]

However, because of delay costs for which LAUSD would be responsible, LAUSD continued its plan of constructing new school buildings without laying floor slabs. The earlier plan formulated by LAUSD owner, Temple Beaudry Partners developer, Turner/Kajima contractor, and McLarand/Vasquez architects to raise building walls without conventional slabs was continued. Academy House One, the Administration Building and the Triple Gym were built on enhanced perimeter foundations with strengthened perimeter walls. Bare earth remained under the buildings. The plan was to pour the concrete slabs sometime in the future after the Los Angeles Fire Department issued permits.

By June 1999, seven months later, the buildings had been erected without slabs, extensive methane testing was completed by Environmental Strategies Corporation, and the design of the barriers was finished, but the Los Angeles Fire Department and the Department of Toxic Substances Control would not approve the mitigation system.[299] Faced with this uncertainty, LAUSD sought to slow down or temporarily stop the project to further address the environmental issues being raised by the Department of Toxic Substances Control and others.[300] LAUSD's newly retained law firm of Weston, Benshoof, Rochefort, Rubalcava & MacCuish brought in construction expert Wayne

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[297] *Id.*

[298] *See* the *Los Angeles Times* at www.latimes.com, the *Los Angeles Daily News*, at www.dailynews.com, and the *LA Weekly*, at www.laweekly.com for special coverage and reports on the Belmont Learning Complex during this period.

[299] On February 22, 1999, LAUSD signed a Voluntary Corrective Action Agreement with the California Department of Toxic Substances Control, granting the DTSC complete environmental jurisdiction over environmental remediation and mitigation at the Belmont Learning Complex.

[300] Wayne Sheridan arbitration testimony (December 8, 2000); Wayne Sheridan's Subcontractor Reports (July 2, 2001).

Sheridan, a former construction manager and contractor based in Marblehead Massachusetts, to examine the feasibility of temporarily stopping construction.[301]

Project cessation and subcontractor payment review. In July 1999, LAUSD directed Temple Beaudry Partners to submit a change order proposal for suspension of all construction on August 1, 1999. LAUSD authorized an amount not to exceed $2,200,000 be spent to secure the site.[302] Turner/Kajima was directed to develop a schedule of values for the slowdown period from August 1, 1999 to October 15, 1999. On November 9, 1999, LAUSD declared that the project was suspended indefinitely. On January 25, 2000, LAUSD abandoned the project.[303]

In July 1999, Wayne Sheridan inspected the site and made recommendations as to how the project could be suspended.[304] Sheridan believed that the project could be safely completed once the methane control system was approved. It was his expectation that construction could resume on a fast track by November 1999.[305] Accordingly, in July 1999, Sheridan requested that the subcontractors deliver all their building material to the site. This would result in an unusually large July pay application because the subcontractors would be required to purchase all the material required to complete their contracts. Sheridan believed the presence of the materials on site would enable the contractors to resume construction more quickly.[306]

In September 1999, Wayne Sheridan began an analysis of the pay applications that had been submitted by the subcontractors. He concluded that selected subcontractors had overstated work performed or material purchased and had overbilled LAUSD. He also examined the change orders and concluded that many had been impermissibly passed through to LAUSD and paid.[307] Finally,

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[301] Wayne Sheridan arbitration testimony (December 8, 2000).

[302] *Id*.

[303] LAUSD Board of Education Minutes.

[304] *Id*.

[305] Wayne Sheridan arbitration testimony (December 8, 2000).

[306] *Id.*

[307] Change orders are changes in the scope of work or design directed by LAUSD, Temple Beaudry Partners or Turner/Kajima. Costs for these modifications may raise the Guaranteed Maximum Price. For example, changes in design or delay costs resulting from environmental remediation result in change orders and increase the Guaranteed Maximum Price. A second type of change order is issued by Temple Beaudry Partners or Turner/Kajima for unexpected changes in the subcontractors scope of work. These internal change orders did not increase the Guaranteed Maximum

he concluded that the allowances[308] were not properly identified in the pay applications, but rather were instead spread across other line items and hidden. Sheridan believed that such practices were not permitted under the Disposition and Development Agreement and were contrary to standards in the construction industry.[309]

Wayne Sheridan worked closely with LAUSD from July 1999 to May 2001, and he served as LAUSD's construction expert for the BLC payment arbitration proceeding. In the arbitration Sheridan testified as to his observations, analysis, and conversations with the builders and Turner/Kajima representatives. Sheridan's expertise was the foundation for LAUSD's case alleging overbilling, fraud, and false claims on the part of the builders and Turner/Kajima, and Sheridan's findings were the basis of LAUSD's allegations against the subcontractors.[310]

During 2000–01, Wayne Sheridan also served as the primary construction expert for the Los Angeles District Attorney's investigation into allegations of wrongdoing by the subcontractors and Turner/Kajima. District Attorney staff have interviewed Sheridan many times, and he has prepared written narratives of the case and presented a two-day review of his conclusions to the Belmont Task Force on July 2–3, 2001. Sheridan also testified before the Grand Jury in its investigation of the Belmont Learning Complex.

Arbitration proceeding and decision. The Disposition and Development Agreement called for binding arbitration under the jurisdiction of the American Arbitration Association to settle any disputes over performance not resolved by progress payment hold backs, informal negotiation, or mediation.[311] The developer, Temple Beaudry Partners, the contractor, Turner/Kajima, and the architect filed for arbitration against LAUSD alleging breach of contract. The principal claim was for payment of approximately $17 million in fees and payments owed them for work allegedly

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Price.

[308] Allowances were allotted to subcontractors for expenses without easily fixed prices such as specialized labor costs, cleanup labor costs, temporary power and water, portable toilets, and trash dumpsters. Generally, allowances equaled about 10% of the contract.

[309] LAUSD retained Navigant to prepare a quantitative analysis of work performed and material in place and on site.

[310] Navigant's analysis was utilized by Mr. Sheridan and is incorporated into his work.

[311] Disposition and Development Agreement, 5.4.

performed in 1999. LAUSD counterclaimed, alleging breach of contract and violation of the False Claims Act.[312]

The initial phase of the arbitration hearing took place in Santa Monica from December 2000 through January 2001. After several rounds of supplemental declarations, the proceeding was completed on May 11, 2001. The arbitrator issued his opinion on June 7, 2001, awarding over $17,000,000 to developer Temple Beaudry Partners, architect McClarand, Vasquez & Partners, and general contractor Turner/Kajima. Temple Beaudry Partners was awarded $2,490,115, McClarand, Vasquez & Partners $745,593, Turner/Kajima $13,898,640 (including $8,547,457 for the subcontractors). The arbitrator awarded the following sums to the six subcontractors who had been referred to the District Attorney's Office by LAUSD for possible violations of Penal Code section 72 (false claims) and section 487 (grand theft):

- BMP Group $136,000
- Downey Electric $1,279,821
- Keenan, Hopkins, Suder & Stowell Contractors (KHS&S) $1,146,371
- Queen City Glass $55,090
- Rucker Tile $131,015
- Winegardner Masonry $743,117

The arbitrator's ruling does not have a binding effect on criminal liability or a decision to bring criminal charges. However, the arbitration proceeding serves as a highly significant preview of any possible criminal prosecution of the subcontractors or Turner/Kajima. LAUSD presented its case of overbilling, front loading, and fraud through the observations, analysis, and expert testimony of Wayne Sheridan. That evidence, in addition to the pay applications, contracts, correspondence and other documentary evidence would be essentially the same evidence presented in any criminal prosecution on these facts. In response to that evidence, in every instance, a disinterested arbitrator ruled against LAUSD's claims of subcontractor wrongdoing. The arbitrator stated that Temple

[312] Gov't Code § 12650 *et seq.*

Beaudry Partners, Turner/Kajima (and their subcontractors), and architect MVP properly fulfilled their obligations under their respective contacts.[313]

In order to prevail in the civil arbitration, LAUSD had only to "*demonstrate that the billings submitted by Turner/Kajima and its subcontractors in the ordinary course of business were excessive*."[314] Under the False Claims Act governing this civil action, LAUSD had only to prove that a *false claim for payment had been knowingly submitted*. These claims did not have to be proven beyond a reasonable doubt, nor was it necessary to prove that Turner/Kajima possessed a specific intent to defraud LAUSD as would be required in a criminal prosecution.[315]

Of most direct relevance to these issues, the arbitrator made the following observations and findings in his decision:

- "The DDA specifically exculpated TBP from any responsibility for costs or delays associated with the preexisting environmental state of the site and provided that the development price shall be subject to adjustments as necessary to remediate oil field conditions. (DDA, Article 3.3)."[316]

- "Construction proceeded relatively uneventfully for more than a year until November 1998 when LAUSD put a hold on all slab on grade construction because of the presence of methane gas. In certain areas — such as Academy House I, the triple gym, and the administration building — rather than stop all construction, a perimeter slab was poured so the walls could be constructed. In Academy House I, this involved significant structural modifications that were extremely labor intensive."[317]

- "On November 9, 1999, LAUSD passed a resolution directing that all work on the project be "suspended indefinitely" as of November 23, 1999. This was

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[313] *Temple Beaudry Partners, et al. v. Los Angeles Unified School District* (2001) 72 Y 115 004 18 000.

[314] *Id.* (emphasis added).

[315] The burden of proof was a *preponderance* of the evidence. The mental state necessary was *knowledge*, *i.e.*, that the contractor *knowingly* submitted a false claim *for any reason*.

[316] *Temple Beaudry Partners, et al. v. Los Angeles Unified School District* (2001) 72 Y 115 004 18 000, at 12.

[317] *Id*. at 14.

followed by the passage of a resolution on January 25, 2000 that the project would not be used a district school. Although there were negotiations and agreements concerning the amounts due subcontractors for work performed and material delivered in July 1999, no payments have been made for this work. In fact, since the payment of the June 1999 pay application (#27) LAUSD has withheld all retention as well as all other monies due for base contract and change order work."[318]

- *"TBP, TK, and MVP properly performed their obligations under their respective contracts*."[319]

- "LAUSD's failure to pay the amounts due under Pay Application No. 28 for work performed in July, 1999 was a default under the DDA. This default occurred at least as early as September 1, 1999."[320]

- "After September 1, 1999, LAUSD committed additional defaults, by *inter alia*, failing to approve legitimate change order requests, failing to issue extensions of time, indefinitely suspending the project and failing to implement the DDA in good faith and undertake its obligations with due regard for principles of fair dealing in violation of Article 6.1 of the DDA. These and the default identified in the preceding paragraph constituted material breaches of LAUSD's contractual obligations."[321]

- "Although the post-July 1999 negotiations led to some reductions in the amounts requisitioned on behalf of certain subcontractors, these reductions were made principally to correct innocent billing errors or were concessions given because of the dire straits in which the subcontractors found themselves in reliance upon the assurances that they would receive prompt payment." [322]

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[318] *Id*. at 16.

[319] *Id*. at 19.

[320] *Id*.

[321] *Id*. at 20.

[322] *Id*.

- "The subsequent course of conduct of LAUSD, acting through its newly chosen designees, Messrs. Sheridan and Weyrauch, is, in many respects, indefensible. Examples include: (i) Mr. Sheridan's insistence that all available material be shipped to the project site in July, 1999 and LAUSD's subsequent refusal to pay for any of those materials; (ii) Mr. Weyrauch's insistence that the subcontractors receive no compensation for delays and interferences resulting from the slowdown period; (iii) the efforts of Mr. Sheridan and Navigant [another consultant retained by LAUSD] to reduce the amounts due subcontractors base on the percentage completion of their work calculated in accordance with schedules of values that had been in place and accepted by all parties; and (iv) the assertion of FCA [False Claims Act] violations without any legitimate basis. This conduct aggravated the already difficult situation created by the indefinite suspension of work and unnecessarily damaged innocent subcontractors who were not responsible for the shutdown and were simply trying to get paid for their work."[323]

- *"Neither TBP, TK, nor TK's subcontractors intentionally overbilled for work performed on the project."*[324]

- "LAUSD did not pay for any work that was not completed and billed in accordance with the DDA and the parties' established course of dealings."[325]

- *"No false items were intentionally included in any progress payment application or billing submitted by TBP, TK, or TK's subcontractors on the project*."[326]

- "Even if costs resulting from alleged design errors or omissions are deemed to be TBP's responsibility under Article 4.1 of the DDA, they are nonetheless properly chargeable against the GMP as a cost of the work."[327]

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[323] *Id.*

[324] *Id*.

[325] *Id*. at 21.

[326] *Id*.

[327] *Id*.

- *"LAUSD has failed to sustain any of the elements of its counterclaims against TBP, TK, or MVP or its third party claim against Kajima Corporation*.[328]

- "LAUSD is liable to TBP, TK and MVP for the damages they suffered as a result of LAUSD's material breaches of its contractual obligations."[329]

- "The fact TBP did not approve a change to a subcontractor's work does not mean LAUSD is not liable for the cost of that change. The disruptions in the project beginning with the hold on slab construction and continuing through the initial suspension, indefinite suspension, and ultimately abandonment of the project excused normal change order administration. Furthermore, since the project costs were within the GMP, the approval or non-approval of change orders has no bearing on whether costs are reimbursable."[330]

- "Although LAUSD's consultants performed a prodigious amount of work in attempting to demonstrate overbilling, their work was flawed to the extent that (a) it was based on a recasting of agreed upon schedules of values; (b) it consisted of detailed take-offs of work in place based upon unit prices or industry valuations without comparing the physical work in place to the subcontractor's entire scope of work in order to arrive at a percentage of completion; (c) it was based upon the cost of completing the work; (d) it ignored change order work; (e) it ignored work exceeding allowances; or (f) it assumed that work or materials that it could not physically verify had not been performed or delivered to the project site."[331]

- "Since TK did not perform general conditions work with its own forces, it had to develop a procedure for reimbursing subcontractors for this work. TK chose to have certain subcontractors spread their allowance for general conditions work throughout the various pay items in their schedules of values. The premise of this approach is that general conditions work is expected to occur at the same

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[328] *Id*.

[329] *Id*.

[330] *Id*. at 29.

[331] *Id*. at 29.

> pace as productive work. Since the allowance was to be adjusted later, there is nothing wrong with this approach."[332]

Generally, the arbitrator concluded that LAUSD had aggravated an already difficult situation created by the suspension of construction and damaged innocent subcontractors who were not responsible for the presence of methane or hydrogen sulfide. The subcontractors simply wanted to get paid for the work they had done. *The arbitrator concluded the LAUSD experts were wrong, and found that fraud, overbilling, and false claims had not occurred.* Accordingly, he awarded Turner/Kajima and the subcontractors the millions of dollars that they had claimed were due them.

This conclusion is buttressed by the court of appeal's August 7, 2002, dismissal of LAUSD's appeal of the arbitrator's decision and award, which decision is now final and which award has now been paid in full.[333]

D. Legal Analysis

The alleged overbilling and false claims arose, in many instances, out of circumstances that were the result of the LAUSD contract breach or the adjustments to the scope of work caused by the environmental problems that were the contractual responsibility of LAUSD.

Many of the subcontractor billing and progress payment activities (to which LAUSD and Sheridan objected after the project was stopped) can be reasonably be interpreted to have been the result of contract modifications negotiated between the parties including LAUSD. The well-regarded national construction management firm of Daniel, Mann, Johnson and Mendenhall (DMJM), verified and approved on behalf of LAUSD the progress of the work and accuracy of payment applications 1 through 27. It was self-evident, for example, that the slabs had not been poured, yet partial payments were made for the installation of those slabs. The most reasonable explanation is that the concrete subcontractor who submitted payment applications for the slabs did so and was paid under an original cost breakdown for traditional slab installation that did not reflect the changes caused by the discovery of methane and hydrogen sulfide. Generally, the allegations of criminal false claims and grand theft fail to account for the changed project conditions and scope

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[332] *Id*. at 30.

[333] *LAUSD v. Temple Beaudry Partners, et al*., California Court of Appeal, Second District, Case No. B154183, Aug. 7, 2002.

of work caused by the discovery of the methane and hydrogen sulfide gas and the eventual cessation of work.

The BLC situation stands in sharp contrast to the typical fraud situation where a contractor who has done little or no work overbills the owner, collects payment on the overbilling, and then abandons the job. Under that scenario, the owner has overpaid, has no building, and has no contractor, while the contractor has run off with the money. In the BLC matter, none of these hallmarks of fraud are present. The subcontractors have performed substantial work on their contracts. In all of the cases, the alleged overbilling amounts are modest when compared to the total amounts of the contacts. Lastly, the owner abandoned the job, not the subcontractors. The subcontractors at the Belmont Learning Complex were ready to fulfill their obligations, but were prevented from performing by LAUSD's decisions.

In the event of a contract dispute, the Disposition and Development Agreement provided a series of remedies, which would ordinarily begin with withholding payment, and only as needed to mediation, and ultimately to binding arbitration.[334] Here the regular sequence of usual remedies was not available because LAUSD unilaterally suspended construction and interfered with the subcontractors' ability to complete their contracts in the process.

E. Specific Subcontractor Billing Fraud Allegations

Rucker Tile. It has been asserted that Rucker Tile presents the clearest case of false claims under Penal Code section 72. LAUSD's *IG Report II* previously referred Rucker Tile for further investigation and identified an alleged overbilling of $101,072. Rucker Tile also illustrates an important issue common to all the subcontractors relating to the method of billing for overhead and profit in a fixed price labor and materials contract.

Rucker Tile contracted with Turner/Kajima on October 10, 1998, to supply and install ceramic tile in the Belmont Learning Complex. The fixed price contract was for $358,000. Rucker Tile obtained a performance bond securing their obligations under the contract.

Rucker Tile ordered material and began to install tile in July 1999. During that same month, LAUSD acting through Wayne Sheridan instructed all subcontractors, including Rucker Tile, to purchase and deliver all materials to be used in the job to the site. Rucker Tile did as instructed and

[334] *See* Disposition and Development Agreement sections 4.3.2, 4.3.3, 5.4.

purchased and delivered the entire quantity of tile needed for the six-month job in July.[335] In its July pay application Rucker Tile billed for $221,072, $213,539 of which was for ceramic tile delivered to the site. Wayne Sheridan inspected Rucker's pay application in September 1999. He requested Rucker to provide documentation for the material costs.[336] Rucker provided tile invoices totaling $100,358.

Wayne Sheridan's position was that material costs had been overbilled by $113,181, the difference between the amount claimed on the pay application and the amount actually spent by Rucker. Rucker Tile's position was that its contract with Turner/Kajima had no provision for billing of overhead or profit, that there were no specific profit or overhead line items in the contract, and that profit and overhead should instead be spread over other line items. The expected profit for the entire contract, or at least a substantial percentage of it, was billed in the July pay application and accounted for the $113,181 sum that LAUSD considered overbilling.[337] Rucker Tile would have billed for the profit associated with the supply of materials over a period of six months but for the fact that Wayne Sheridan directed subcontractors to purchase and deliver all material in July.

Sheridan and LAUSD rejected this interpretation of the contract. They acknowledged that overhead and profit could be spread across other line items, but maintain that pattern and practice in the construction industry permits only billing for a proportionate share, matching the progress for the tile work actually completed. LAUSD relied in part on Public Contract Code section 9203, which provides that in public construction projects over $5,000, progress payments must be utilized and payment made only for work completed.[338]

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[335] The duration of Rucker Tile's contract was six months. *See* Frank Dupuis arbitration testimony (December 8, 2000).

[336] Receipts from vendors, invoices or purchase orders were requested. Of all the subcontractors, only Rucker Tile has provided such back up information.

[337] Frank Dupuis arbitration testimony (December 8, 2000).

[338] Public Contract Code, section 9203 provides:

> (a) Payment on any contract with a local agency for the creation, construction, alteration, repair, or improvement of any public structure, building, road, or other improvement, of any kind which will exceed in cost a total of five thousand dollars ($5,000), shall be made as the legislative body prescribes upon estimates approved by the legislative body, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to, or under the control of, the local agency, and unused. The local agency shall withhold not less than 5 percent of the contract price until final completion and acceptance

Billing for profit and overhead up front, called "front loading," is not expressly approved or prohibited under this statute. In fact, no method for billing for profit and overhead is provided by the applicable statutes. And even if Public Contract Code section 9203 were to be interpreted so as to prohibit front loading, section 9203 is not a criminal statute and provides no criminal liability or sanction.

Also, subcontractor overhead and profit are not specifically recognized in the contracts of Turner/Kajima, Temple Beaudry Partners, or LAUSD. Whether a subcontractor made a profit, broke even, or lost money was not an issue that was addressed in the contracts.[339] Even if a subcontractor had substantially underbid the project, the subcontractor was limited to the lump sum contract price. If the subcontractor did not finish the job, the performance bond would pay to complete the work.[340]

The Turner/Kajima/subcontractor contracts, including that of Rucker Tile, were silent on whether the overhead and profit must be spread proportionately over the length of the job in monthly progress payments. There was no express language preventing a subcontractor from taking profits at the beginning of the job. Of course, LAUSD could refuse to pay for such front loading of overhead and profit, as it did. *However, LAUSD would not issue a check on any pay application unless the LAUSD on-site representative expressly approved the payment in writing.* LAUSD had complete control over this process. Moreover, nothing prevented LAUSD from insisting that a provision requiring proportionate monthly progress payments for overhead and profit be inserted into the Disposition and Development Agreement. The existing evidence is insufficient to establish that Rucker Tile intended to defraud LAUSD when it submitted the July pay application. CALJIC 2.02 requires that the fact finder accept Rucker Tile's explanation, if reasonable, as true. Rucker

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> of the project. However, at any time after 50 percent of the work has been completed, if the legislative body finds that satisfactory progress is being made, it may make any of the remaining progress payments in full for actual work completed.
>
> (b) Notwithstanding the dollar limit specified in subdivision (a), a county water authority shall be subject to a twenty-five thousand dollar ($25,000) limit for purposes of subdivision (a).

[339] Los Angeles District Attorney's Office interview of Mark Turner (dated October 31, 2001).

[340] Los Angeles District Attorney's Office interview of Roger Friermuth (July 11, 2001). Mr. Friermuth states that LAUSD was fully protected because of the Guaranteed Maximum Price nature of the project, and LAUSD expected to pay no more than the Guaranteed Maximum Price, and that the job would be satisfactorily completed because of the performance bond.

Tile's conduct was arguably permissible under the contract. It cannot be established that Rucker Tile specifically intended to defraud LAUSD.

In addition, the circumstances surrounding the project abandonment by LAUSD introduce substantial fairness issues in evaluating any prosecution. Rucker Tile was on site and prepared to fulfill its obligations under the contract. When the project was suspended, Rucker Tile was prevented from completing its contract. In July 1999, following Wayne Sheridan's request, Rucker Tile purchased and delivered the entire quantity of ceramic tile for the job. After delivering the tile, Rucker tile worked through July installing the bathroom tile. Rucker Tile submitted its first pay application at the end of July, and LAUSD did not pay. As a result, Rucker Tile owed its venders for the cost of the materials.

While LAUSD objected to Rucker Tile's bill, Rucker Tile in fact followed LAUSD's explicit instructions to deliver six months worth of materials in July. It is not disputed that invoices documented substantial materials costs, and that some work had been done. As with the other subcontractors, LAUSD's refusal to pay caused Rucker Tile financial distress.[341] LAUSD had suffered no economic loss. Rucker Tile presented LAUSD a revised claim for $131,015 for labor and material supplied to the Belmont Learning Complex project. *The arbitrator awarded that amount in favor of Rucker Tile after the arbitration hearing where LAUSD's theory of false claims was litigated and rejected*.[342]

Under the facts of this case, there is insufficient evidence to establish that Rucker Tile had the requisite intent to defraud when it submitted its payment application to LAUSD. Accordingly, there is insufficient evidence to charge Rucker Tile with filing a false claim in violation of Penal Code section 72, or with grand theft in violation of Penal Code section 487.

BMP. BMP contracted with Turner/Kajima on May 8, 1998, to pour cast-in-place concrete slabs, foundations and walls. The base contract was for $2,410,702. LAUSD's *IG Report II* initially referred BMP for further investigation and identified an alleged overbilling of $491,326. BMP is unique among the six subcontractors examined in that its contract was closed out in a negotiated

[341] Frank Dupuis arbitration testimony (December 8, 2000).

[342] On November 6, 2001, LAUSD delivered payment to Rucker Tile in the amount of $111,015 as a settlement of Rucker Tile's claim.

settlement with Turner/Kajima prior to the completion of BMP's work.[343] The parties agreed that BMP had completed 53% of the contract, worth $1,360,000. A deductive change order was issued for $1,050,702, accounting for the balance of the base contract.[344]

To some observers BMP appears to present a sound case for alleged overbilling, as it billed for *completed* foundations or slabs in Academy House I, the Triple Gym, and the Administration Building.[345] A cursory inspection today reveals, as it would have in June of 1999, that there is dirt and not concrete floor slabs on grade in the subject buildings. BMP performed its work from December 1998 to June 1999. It has been alleged that pay applications submitted for non-existent floor slabs are evidence of false claims and grand theft by BMP.[346]

These allegations, however, fail to acknowledge the consequences of LAUSD's decision to halt further slab installation during the course of construction. The discovery of methane and hydrogen sulfide gas had a significant effect on the scope of work for the subcontractors. As the buildings went up, slabs on grade awaited the approval and installation of the methane control systems. Academy House I, the Triple Gym, and the Administration Building were to be built on concrete foundations. Interior steel supported the structures, including the upper floors and roof. Under normal construction methods, the concrete foundation, consisting of footings and floor slabs, would be the first step in the construction process. But LAUSD did not want to stop all construction while waiting for approval of the methane control system that needed to be installed before the floor slabs could be poured. Under the Disposition and Development Agreement LAUSD was responsible for all delay costs attributable to environmental conditions. Temple Beaudry Partners and Turner/Kajima devised a method to raise the three large structures absent the floor slabs. Modified perimeter walls were designed to temporarily replace the support provided by the floor slabs. None of this was a secret to LAUSD; to the contrary, it was done at LAUSD's express request.[347]

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[343] BMP Concrete was closed out in June 1999.

[344] A deductive change order reduces the base contract amount, decreasing the payment due BMP Concrete.

[345] Foundational Slabs in Academy House I, $92,4000, Triple Gym, $127,700, and Administration Building, $75,000.

[346] Wayne Sheridan arbitration testimony (December 8, 2000).

[347] ODAC Minutes where the hold for slab on grade concrete foundations and the plans to erect the buildings absent the slabs are discussed in the bi-weekly meetings, month after month.

BMP was the subcontractor responsible implementing many of these design and construction changes. BMP's scope of work under its contract was extensively modified, requiring a significant increase in labor and costs to BMP. According to Mark Turner, the original number of concrete pours was expected to be three, but that number increased to twenty-eight.[348] BMP billed for much of this additional work under the slab on grade line items. Although LAUSD complained about this billing procedure in October 1999, it approved the payment applications for the work in late 1998 and early 1999.[349] Turner/Kajima was aware of the scope of work modifications and prior payment applications, and incorporated those changes into the closeout settlement. BMP's schedule of values was reconfigured to reflect its modified obligations under the contract.

The settlement agreement paid BMP for completing 53% of the contract. That settlement was approved by LAUSD. Using an estimate of the cost to complete BMP's original contract, as Wayne Sheridan had done, to calculate the purported overbilled figure, was inaccurate because the cost to complete the original scope of work ignored the changes expressly or implicitly approved by the general contractor and LAUSD. Because BMP's scope of work was substantially changed, Turner/Kajima and BMP negotiated a settlement assigning a fair value for the work BMP had completed.[350]

Wayne Sheridan has also questioned BMP's billing of allowances.[351] Turner/Kajima instructed subcontractors to spread their allowances proportionately over other line items. There was no separate entry or line item for allowances, and they were not specified in the pay applications. However, Turner/Kajima maintained a daily log documenting allowance use by subcontractors, and through this means allowances were tracked and accounted for by Turner/Kajima.[352] Wayne Sheridan has maintained that this procedure is suspect and unapproved, and that all allowances

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[348] Mark Turner arbitration testimony (December 5–6, 2000).

[349] The February to June 1999 pay applications were signed by Paul Hurley. In addition, all parties were aware that slabs are not being laid. The buildings were going up, inside the buildings were dirt floors. *See* ODAC Minutes.

[350] As mentioned, LAUSD was financially responsible under the Disposition and Development Agreement for any cost increases due to environmental problems encountered in building the Belmont Learning Complex. The original cost for concrete work *increased* after the discovery of methane, and had to be paid by LAUSD. Thus BMP's original contract would have been insufficient to complete the work.

[351] Allowances were allotted to BMP, Downey Electric, KHS & S, and Winegardner for expenses without easily fixed prices, including specialized labor costs, cleanup labor costs, temporary power and water, portable toilets, and trash dumpsters. Generally, allowances equaled about 10% of the contract.

[352] Mark Turner arbitration testimony (October 31, 2001).

should be disallowed as they constitute a false claim. Specifying the allowances in a separate line item appears to be a better practice for an owner as the subcontractor would then be limited to billing for what was actually used. The Disposition and Development Agreement, however, had no provision approving or prohibiting the procedure actually used. Public Contract Code section 9203 would appear to prohibit this practice, but as noted, violation of section 9203 is not a crime.[353] Allowances were tracked and documented by Turner/Kajima, and reconciled in the closeout.

After considering the work actually performed by BMP, and examining its pay applications and the closeout settlement with Turner/Kajima, the District Attorney's Office concludes there is insufficient evidence to establish that BMP has filed a false claim or engaged in grand theft. BMP's original contract was modified during the course of construction because of decisions made by LAUSD. The method of billing on the modified contract was approved, at least implicitly, by all parties. BMP did the work necessary to raise the buildings under the modified contract, and did so for a price negotiated and approved by the parties. There is no credible evidence that BMP possessed a specific intent to defraud LAUSD. Under the facts of this case, there is insufficient evidence to charge BMP with filing a false claim in violation of Penal Code section 72, or grand theft in violation of Penal Code section 487.

Downey Electric. Downey Electric (DE) contracted with Turner/Kajima on June 25, 1998 to install the electrical and computer technology systems at the Belmont Learning Complex. The base contract was for $5,946,238. Change orders increased the contract by another approximate $2,000,000.[354] LAUSD's *IG Report II* initially referred Downey Electric for further investigation and identified an alleged overbilling of $531,006. Downey Electric was paid a total of $4,999,814,[355] and the balance on its contract was $3,104,624. LAUSD has withheld $457,201 in retention. The principal sources of the alleged overbilling were said to be: overestimating the percentage of completion on the contract; improper change order billing; and misuse of allowances in the manner alleged against BMP.[356]

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[353] Another theory examined by the Task Force alleged that Turner/Kajima set up the allowance system to benefit financially at the end of the job. *See* section on Turner/Kajima and allowances.

[354] Downey Electric July 1999 pay application.

[355] Including Change Orders.

[356] By March 15, 2001, based on the same data, Mr. Sheridan had increased the amount of alleged overbilling, largely from allowances, to "a little over $900,000." *See* Grand Jury testimony of Wayne Sheridan (March 15, 2001).

In its July 1999 pay application, Downey Electric certified that $5,449,430 worth of work was in place. Beginning in August, Wayne Sheridan questioned Downey Electric and Turner/Kajima about the estimate of work in place and he requested backup documentation to support the estimate. Numerous meetings between the parties occurred at the job site to discuss these concerns. Sheridan believed that Downey Electric had billed for a large technology change order that had not been completed.[357]

In August 1999, Downey Electric submitted a pay application including $250,974 for work to be completed and materials to be purchased for a technology system.[358] However, the federal program that was to fund the technology system work was suspended. When Downey Electric was notified of the federal program suspension, Downey Electric ceased work related to the federal program and made no further materials purchases. On September 13, 1999, Downey Electric submitted a revised pay application claiming only $17,750 worth of work performed.[359] According to Brian Arthur of Turner/Kajima, Downey Electric erroneously billed for the technology system change order in its August pay application. The program was suspended after the pay application had been submitted. When notified of this, Downey Electric acknowledged an error of $233,224 and reduced its bill. There was no criminal wrongdoing associated with this error. [360]

Wayne Sheridan has also asserted that numerous change orders were improperly passed along for payment to LAUSD when the change orders should have been paid by Temple Beaudry Partners under the terms of the Disposition and Development Agreement. Sheridan pointed specifically to the technology change order for the public address system. However, under one interpretation of the Disposition and Development Agreement this type of change order was to be paid by LAUSD as a cost of the work provided that the Guaranteed Maximum Price had not been reached. The arbitrator generally reached the same conclusion. In any event, these issues are a matter of contract interpretation. While the parties may have disagreed on the meaning of certain language in the Disposition and Development Agreement, those disputes were civil, and not criminal in nature.

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[357] Change order CC657, for "E-Rate Technology Systems." This was a federally funded program to hard wire schools for computers, with the objective of placing a computer into every classroom.

[358] In the July 1999 pay application, DE billed $26,418 for CC657. In the August 1999 pay application, by which time LAUSD had terminated DJMM and Paul Hurley, this amount increased to $250,974.

[359] Downey Electric letter (September 13, 1999).

[360] Los Angeles District Attorney's Office interview of Brian Arthur (October 31, 2001).

After negotiations with Wayne Sheridan in October 1999, Downey Electric revised its July 1999 pay application reducing the estimated value of work in place from $5,449,430 to $5,006,745.[361] While the revised pay application was an acknowledgment of billing errors, it also was a concession to LAUSD's demands. As of October 1999, LAUSD had not made payment a pay application since June 1999. Understandably, Downey Electric needed to be paid for its last four months of work.

Downey Electric's acknowledgment that errors were made in change order billing and work in place estimates, and Downey Electric's willingness to reduce its pay application when confronted with these discrepancies, together form the ostensible basis of the allegation that Downey Electric has made criminal false claims. Downey Electric's position is that the errors were innocent mistakes that were corrected when brought to Downey Electric's attention. Nearly $3,000,000 worth of work remained and Downey Electric was on the job and apparently prepared to complete its contract obligations. It was the opinion of Downey Electric's project manager that Downey Electric had underbilled, and not overbilled.[362] The project manager noted that during the course of the contract, substantial changes in Downey Electric's scope of work were put in place. He stated that there were approximately 100 electric change orders totaling nearly $3,000,000. Downey Electric performed work on these change orders but was not paid for the work. The evidence is insufficient to establish that any billing errors had been made with intent to defraud.

Downey Electric's contract contained $707,500 worth of allowances. As in the case of BMP, Wayne Sheridan maintained that the practice of spreading allowances over other line items was suspect and unapproved.[363] LAUSD therefore sought to disallow payment for the entire allowance allotment. Turner/Kajima disagreed and claimed that Downey Electric used the allowances properly, as was documented by daily logs, invoices, and time and material tickets. As the general contractor, Turner/Kajima was ultimately responsible for the subcontractors' work and billing. Downey Electric, and all of the subcontractors, contracted with Turner/Kajima, not LAUSD. Turner/Kajima would appear to have little motive to permit Downey Electric or any subcontractor

[361] The adjusted work in place amount includes the $234,224.

[362] Downey Electric claimed that LAUSD owed them a total of $1,553,140 for work performed on the contract.

[363] While this practice is lawful, better practice for public contracts would require allowances to be earned. This is discussed further in the Proposed Legislation section.

to abuse the allowances. Turner/Kajima's reconciliation demonstrated that Downey Electric properly used its allowances.[364]

Downey Electric's claim against LAUSD was for $1,297,821. The arbitrator awarded this amount to Downey Electric on June 7, 2001. The LAUSD appeal of the arbitrator's decision was dismissed on August 7, 2002, and LAUSD has subsequently paid Downey Electric in full. Under the facts of this case, proof that Downey Electric intended to defraud LAUSD is absent. There is insufficient evidence to prosecute Downey Electric for filing false claims in violation of Penal Code section 72, or with grand theft in violation of Penal Code section 487.

Keenan, Hopkins, Suder & Stowell (KHS&S). Keenan, Hopkins, Suder & Stowell contracted with Turner/Kajima on July 9, 1998, to install metal studs, drywall, exterior plaster, and display boards in classrooms. The base contract was for $6,760,360. LAUSD's *IG Report II,* initially referred Keenan, Hopkins, Suder & Stowell Contractors for further investigation and identified an alleged overbilling of $475,131.[365] The basis of LAUSD's referral was that Keenan, Hopkins, Suder & Stowell overestimated the percentage of work in place, thereby overbilling LAUSD.

In July of 1999 Turner/Kajima certified that Keenan, Hopkins, Suder & Stowell had $5,439,990 worth of work in place. The contract balance including change orders was $2,398,705. Retainage was $547,999. The July 1999 pay application from KHS & S certified that drywall and framing in Academy Houses III and IV was 100% complete. The firm further certified that caulking was 90% complete, and estimated that Academy House I was 78% complete.[366] Beginning in September, Wayne Sheridan checked the progress of this work and disagreed with the estimates. Overall, Sheridan believed that the correct contract completion percentage was 68%. Sheridan contacted Turner/Kajima and requested substantiation for amounts billed through July 1999.

Part of the base contract between Turner/Kajima and KHS & S contained $779,000 worth of allowances and deductive alternates.[367] (Deductive alternates are defined as work that if not done,

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[364] Turner/Kajima reconciliation for Downey Electric.

[365] Wayne Sheridan increased this figure to $1,000,000 when he testified at the Grand Jury on March 15, 2001, then, based on the same data, increased the figure again to $1,250,000 four months later, on July, 2, 2001.

[366] July 1999 pay application.

[367] Deductive alternates $559,000, allowances $220,000.

would be deducted from the contract.) Wayne Sheridan also questioned whether the deductive alternates and allowances had been completed and properly billed. He requested an accounting and documentation for the billing on those deductive alternates and allowances. Turner/Kajima and KHS & S reviewed the status of the work with Sheridan and on October 18, 1999, reduced their work in place estimate.[368] In a revised July pay application, KHS & S lowered its work in place estimate to $4,964,859, a difference of $474,135. After an accounting on the use and billing of deductive alternates and allowances, Turner/Kajima credited back to LAUSD $559,000 in allowance costs not used. After these revisions, Keenan, Hopkins, Suder & Stowell's claim against LAUSD for work and material was reduced to $1,327,978. KHS & S stated that there was no intentional overbilling and that they had inadvertently overbilled on some line items and underbilled on others.

LAUSD alleged that submitting revised pay applications lowering the work in place percentages and issuing an allowance credit demonstrated wrongdoing and should be considered an admission of overbilling by Keenan, Hopkins, Suder & Stowell. However, work in place is an estimate and an area where experts can reasonably differ. Wayne Sheridan incorporated a formula calculating the "cost of completion" into his estimate of work in place.[369] His analysis had the effect of rewriting the schedule of values and agreed upon billing system the parties had operated under for nearly two years. Cost to complete analysis as a measure of percentage of work in place is no more reliable than the estimate of the completion cost, a subject upon which experts can reasonably differ. Cost of completion also fails to provide proof that the subcontractors did not intend to complete their contracts for the agreed upon price or that payment applications were knowingly submitted with intent to defraud. According to one of LAUSD's representatives, Greg Kobzeff of Hanscomb, the Belmont Learning Complex project was on schedule to be completed on time and

[368] Keenan, Hopkins, Suder & Stowell letter (October 18, 1999).

[369] While a completion bond insurer could appropriately use a "cost of completion" analysis in the event of default, this analysis is not helpful to determine whether the contractors intended to defraud LAUSD with false claims. "Percentage of completion" and "cost to complete" are two different equations. Theoretically, as the percentage of completion rises, the cost to complete decreases by an equal amount. As the arbitrator noted, however, that approach does not take into consideration start up costs, profit, overhead, and other modifications that occurred on an ongoing basis during construction of this project. The District Attorney's Office interviewed the parties responsible for approving the various costs of work as it was being performed. Those parties have stated that where the cost of work was reasonable it was approved; and, where there was disagreement, negotiations were conducted to resolve the dispute. Further, they said that project suspension and the necessary modifications to accommodate the environmental control "holds" caused modifications to the original schedules of values. The concerns of LAUSD's experts would have been more justified if the project had not been subjected to significant delays and modifications, primarily for environmental reasons.

was on or under the Guaranteed Maximum Price. Greg Kobzeff was unaware of any systematic overbilling by any of the subcontractors during the two years he was at the construction site.[370]

In addition, the evidence does not disprove the claim that Keenan, Hopkins, Suder & Stowell and other subcontractors lowered their bills merely as concessions after being challenged by Wayne Sheridan because they had not been paid for months by LAUSD. At the time, LAUSD owed KHS & S over $1,000,000. Further, Sheridan had asked KHS & S to deliver thousands of sheets of wallboard and other material to the site in July 1999. LAUSD did not pay the June pay application until October 12, 1999. It appeared that Keenan, Hopkins, Suder & Stowell wanted at least a partial payment, even if it disagreed with Wayne Sheridan. This does not prove criminal intent.

Turner/Kajima required the BLC subcontractors to take their allowances proportionately. Turner/Kajima maintained records of allowance use by the subcontractors. After the project was abandoned by LAUSD, Turner/Kajima conducted an accounting of Keenan, Hopkins, Suder & Stowell's allowances. Turner/Kajima properly issued LAUSD a credit of $559,000 for allowances and deductive alternates.

A total of $2,398,705 remained on Keenan, Hopkins, Suder & Sowell's contract, and that firm was still on the job. It cannot be proved that KHS & S was not ready and able to complete its contract with Turner/Kajima for the contract price. Keenan, Hopkins, Suder & Stowell filed a claim against LAUSD for $1,146,371. This amount was awarded by the arbitrator on June 7, 2001.[371] LAUSD paid this award after the August 7, 2002, dismissal of LAUSD's appeal.

Under the facts of this case, it cannot be proved that Keenan, Hopkins, Suder & Stowell intended to defraud LAUSD. There is insufficient evidence to charge Keenan, Hopkins, Suder & Stowell with filing a false claim in violation of Penal Code section 72, or with grand theft in violation of Penal Code section 487.

Queen City Glass (QCG). Queen City Glass contracted with Turner/Kajima on June 5, 1998, to install windows and glass curtain walls at the Belmont Learning Complex project. The base contract was for $1,047,810. LAUSD's *IG Report II* initially referred Queen City Glass for further investigation and identified an alleged overbilling of $58,059. The contract balance was $803,703.

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[370] Hanscomb monthly reports.

[371] LAUSD paid Keenan, Hopkins, Suder & Stowell $35,115 on November 6, 2001. The balance of the arbitrator's award was paid in full after the August 7, 2002, dismissal of LAUSD's appeal.

LAUSD had withheld $37,671 in retainage. Work on the contract began in October 1998. It was alleged that Queen City Glass overbilled LAUSD by certifying that the Academy House's curtain wall and entrance work were 100% complete, when in fact, only 50% of the work was completed. In October 1999, Wayne Sheridan met with Turner/Kajima and stated his view that Queen City had claimed to have completed work which was not in fact completed. Turner/Kajima reviewed the work and agreed to reduce the payment due on Queen City Glass' July pay application by $51,170. These events are the basis of the overbilling allegation.

The owner of Queen City Glass has denied that any wrongdoing occurred.[372] He stated some items were inadvertently overbilled while others were underbilled.[373] The owner believed that the firm accountant took an overall figure from the project manager and broke it down incorrectly in the payment application.[374] The owner also said that Queen City Glass did little of the work themselves; rather QCG employed glass subcontractors to perform parts of the work.[375] Queen Cities' use of subcontractors provides another possible non-criminal explanation for the difference between the actual percentage of work done and the estimate submitted in the payment application. The owner of QCG has also stated that estimating the percentages of work completed in this context is not a strict calculus of adding up figures. He believes that when the contract is less than 100% complete, there are subjective assessments to be made where experts can reasonably differ.[376]

LAUSD characterizes the Turner/Kajima letter reducing the pay application by $51,170 as an admission of overbilling. While the revision could be considered as having some evidentiary significance, as a matter of law the revision is not an "admission" because Queen City Glass did not directly make it. Turner/Kajima cannot make admissions for Queen City Glass. As in the case of other subcontractors, however, it is reasonable to interpret this revision as a result of the negotiating process established by the Disposition and Development Agreement. One goal of Turner/Kajima was to ensure that subcontractors, such as Queen City Glass, were paid in a timely manner.

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[372] Joseph Dennis III interview (November 28, 2000). *See also* interview of Mark Turner (October 31, 2001).

[373] Joseph Dennis III interview (November 28, 2000).

[374] *Id.*

[375] *Id.*

[376] *Id.*

A total of $803,703 remained on Queen Cities' contract, and Queen City Glass was still on the job. It cannot be proved that Queen City Glass was not ready and able to complete its work for the contract price at the time when LAUSD abandoned the project. QCG filed a claim against LAUSD for $55,090. The arbitrator awarded that amount on June 7, 2001. LAUSD paid this award after the August 7, 2002, dismissal of LAUSD's appeal.

Under these facts, specific intent to defraud LAUSD cannot be proved. There is insufficient evidence to charge Queen City Glass with filing a false claim in violation of Penal Code section 72, or with grand theft in violation of Penal Code section 487.

Winegardner Masonry (WM). Winegardner Masonry contracted with Turner/Kajima on June 22, 1998, to install exterior block and masonry on the academies and covered walkways. The base contract was for $5,445,520. LAUSD's *IG Report II* initially referred Winegardner Masonry for further investigation and identified an alleged overbilling of $475,131. Winegardner Masonry was paid a total of $2,485,539, and the balance on the contract was $2,195,343.[377] LAUSD withheld $276,171 in retainage.

It is asserted that Winegardner Masonry overstated percentages of completion of various line items and overbilled their allowances because it failed to adequately document allowance use. In September 1999, Wayne Sheridan concluded that Winegardner Masonry's completion percentages on the parking structure, Administration Building, Triple Gym, and Academy Buildings were inflated. Turner/Kajima and Winegardner Masonry had certified $3,444,325 of work in place and Wayne Sheridan requested documentation to support that claim. On October 16, 1999, Sheridan met with the Winegardner Masonry project manager and the Winegardner Masonry controller to challenge the accuracy of Winegardner Masonry billings. Winegardner Masonry agreed to consider reducing the bill.[378] On October 18, 1999, Winegardner Masonry faxed a spreadsheet to Turner/Kajima that contained billing information, including one column that provided: "$354,418 overbilled." After more discussion between the parties, Winegardner Masonry revised its July 1999 pay application, reducing its work in place estimate by $483,6000. LAUSD maintains that the Winegardner Masonry fax and the revised pay applications are admissions of false claims by Winegardner Masonry.

[377] Including change orders.

[378] Los Angeles District Attorney's Office interview of Dan Ricketts (November 9, 13, 2000).

The Winegardner Masonry manager has stated that his company never intentionally overbilled for work at Belmont. The manager further stated that he never heard any disagreement over percentage completion until the October 16, 1999, meeting with Wayne Sheridan. At that time, Winegardner Masonry had not been paid by LAUSD for over four months. In his opinion, Winegardner had underbilled as of the July pay application. The Winegardner Masonry manager explained that Winegardner Masonry reduced its bill for the sole purpose of getting paid, after LAUSD's project manger informed him that if Winegardner Masonry submitted a reduced bill, Winegardner Masonry would be paid within ten days.[379] Winegardner Masonry's president stated that as of the October meeting with Sheridan, her company could not afford to wait any longer for payment. Winegardner Masonry at this point, according to its president, had over $1,000,000 worth of unpaid work that had been done at the Belmont Learning Complex project.[380] The president claimed that Winegardner Masonry was unable to make its payroll, pay taxes, pay its suppliers, and had exhausted its line of credit with vendors. The president further stated that Winegardner Masonry was willing to make that concession since at that time she believed that Winegardner Masonry would finish the job and ultimately be paid the full amount due on the contract.[381]

These facts show the existence of a good faith dispute about how much work had been completed by Winegardner Masonry. LAUSD utilized "cost of completion" calculations to support its position, and cost of completion is not necessarily an accurate measure of work in place under the contract.

Turner/Kajima's final accounting determined that Winegardner Masonry did not use $144,803 worth of allowances, and a credit was issued to LAUSD for this amount.

It cannot be proved that Winegardner Masonry was not prepared to complete its contract with Turner/Kajima for the contract price. There was $2,195,343 worth of work remaining on the contract when LAUSD abandoned the Belmont project. The arbitrator awarded $743,117 to Winegardner Masonry on June 7, 2001. On November 6, 2001, LAUSD settled with Winegardner Masonry paying Winegardner's claim in full.

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[379] *Id*. *See also* Los Angeles District Attorney's Office interview of Mark Turner (October 31, 2001).

[380] June through October 1999 pay applications. *See* Winegardner letter to Turner/Kajima (October 1, 1999), where Ms. Winegardner explains that the unpaid bills from Belmont could destroy her company.

[381] Los Angeles District Attorney's Office interview of Carolyn Winegardner (December 12, 2000).

Under these facts, it cannot be established that Winegardner Masonry intended to defraud LAUSD. There is insufficient evidence to charge Winegardner Masonry with filing a false claim in violation of Penal Code section 72, or grant theft in violation of Penal Code section 487.

Turner/Kajima allowances. Four of the subcontractors referred by LAUSD for further investigation had approximately 10% of their total contract price allocated to allowances.[382] At Turner/Kajima's request, those allowance costs were spread over the other line items in the cost breakdowns and not delineated as separate line items. As a result, partial payments were made on the allegedly buried allowances contained within the other line items as part of the monthly pay applications based on the percentage of completion of the work. Consequently, subcontractors were paid a partial allowance payment regardless of whether they actually incurred an allowance expense.

According to Turner/Kajima, this practice reduced paperwork and bureaucratic delay with a single accounting resolving the actual allowance expense made at the time of subcontract completion. Turner/Kajima had an interest in seeing that the subcontractors were paid as expeditiously as possible.[383] Turner/Kajima's calculations forecast that the subcontractors would reasonably expend the allowance allotments during the course of the job. Turner/Kajima maintained daily labor and material tickets tracking allowance use. Upon completion of the job, a reconciliation of allowances was planned by Turner/Kajima, and any unused allowance sums paid to subcontractors would be credited back to LAUSD.[384]

LAUSD objected to this practice after construction was suspended. LAUSD pointed out that Turner/Kajima and the subcontractors had no direct contractual relationship with LAUSD. Since Turner/Kajima had contracted with Temple Beaudry Partners, and the subcontractors had contracted with Turner/Kajima, this allowance system made it difficult for LAUSD to audit allowance billing. LAUSD was not a party to the subcontracts. After LAUSD suspended work it was claimed that the allowances were "hidden" or "spread" across other line items, and that allowances were billed and paid each month regardless of whether they were expended.

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[382] Los Angeles District Attorney's Office interview of Brian Arthur (October 31, 2001). The subcontractors who had allowances in their contracts: BMP, Downey Electric, Keenan, Hopkins, Suder & Stowell, and Winegardner Masonry.

[383] Los Angeles District Attorney's Office interview of Mark Turner (October 31, 2001).

[384] Los Angeles District Attorney's Office interview of Brian Arthur (October 31, 2001).

Allegations have been made that Turner/Kajima intended to profit wrongfully from the allowance billing system. It has been theorized that Turner/Kajima intended to defraud LAUSD by failing to credit the unused allowance funds to LAUSD at the completion of the project. It has been further argued that Turner/Kajima created the allowance billing system to secretly hide allowance costs in the monthly pay applications, and that LAUSD, not a party to the contracts between Turner/Kajima and the subcontractors, would be unaware that allowance costs were unused at the completion of the contract. Turner/Kajima, on the other hand, would know exactly what those allowance expenses actually were. Turner/Kajima would require subcontractors to credit those unused amounts back to LAUSD through a charge against the subcontractors' retention.[385] Under this theory, Turner/Kajima could then keep this credit and LAUSD would be unaware of the scheme. The total thus obtained could amount to several million dollars.

However, the evidence to establish the existence of such a scheme by Turner/Kajima to defraud LAUSD does not meet the standard of proof required for a criminal case. No "insider" or other percipient witness has been located, despite an extensive investigation. In addition, documentary evidence tends to disprove this theory. Contrary to the purported scheme, Turner/Kajima has performed an accounting of the allowances and credited back $559,747 to LAUSD.[386]

Although not a party to the Turner/Kajima/subcontractor contracts, LAUSD had those subcontracts in its possession, and used them in evaluating the monthly pay applications. The subcontracts provided for allowances. The allowances were not secret or hidden; in fact, they were disclosed and accounted for by Turner/Kajima early in construction.

Turner/Kajima issued a deductive change order on July 6, 1998, to Prieto Construction Company in the amount of $165,369 for unused allowances.[387] Turner/Kajima accounted for those unused allowances to Temple Beaudry Partners and LAUSD. Prieto Construction Company's contract had been completed in March 1999, and was closed out. In the close out, Turner/Kajima submitted Change Order A-11 that deducted an additional $102,484 for unused allowances. Turner/Kajima notified LAUSD that unused allowances were being deducted from subcontractors and that those amounts were being credited back to LAUSD.

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[385] Hold back by LAUSD of 10% of all subcontractor billings.

[386] Declaration of Brian Arthur (January 10, 2001). This figure does not include the allowance adjustments from the close out of Prieto Construction.

[387] Turner/Kajima Deductive Change Order, D-8.

The evidence is insufficient to support a theory that Turner/Kajima attempted to defraud LAUSD through allowance manipulation. LAUSD abandoned the BLC project before any such alleged manipulation could have even occurred. In the one instance where the contract was actually completed, the allowance expenditure was properly accounted for by Turner/Kajima and was credited to LAUSD.

Under these facts, there is no basis to prosecute Turner/Kajima for attempted grand theft in violation Penal Code sections 664/487.

F. Conclusion

The evidence presented of alleged subcontractor overbilling or other fraudulent conduct is consistently inadequate, especially with regard to the requisite proof of intent to defraud necessary for a false claims or grand theft criminal prosecution. After an extensive hearing process raising these issues, an independent arbitrator has considered and rejected LAUSD's claims of subcontractor wrongdoing. LAUSD's appeal has been dismissed and that decision is now final. A prosecution on these same theories under the more stringent criminal law requirements has no reasonable prospect of success.

Chapter IX

CONSPIRACY ISSUES

Chapter Synopsis

- The highly speculative theory of a large conspiracy of most of the key figures in the BLC project does not meet the stringent evidentiary requirements for a criminal conspiracy prosecution.
- Despite all the lengthy public and private inquiries into this matter, there is absolutely no direct evidence, from any purported co-conspirator, insider, or knowledgeable witness, of an illegal agreement — the essential element needed to prove a criminal conspiracy. The absence of any such witness or document is a strong indicator that no such conspiracy existed.
- Virtually every fact ascribed as potential "evidence" of such a conspiracy also has a reasonable non-criminal explanation, such as normal business motivations, good faith but mistaken business judgment, inexperience, or the unique circumstances of a novel project. The law requires the trier of fact to resolve such ambiguities in favor of defendants.
- The evidence also fails to establish the required target crime, which must be the object of a criminal conspiracy, and this failure of proof is also fatal to such a conspiracy theory.

A. Introduction

The District Attorney's Office has examined allegations of a large-scale criminal conspiracy involving most of the key participants in the Belmont Learning Complex project, including LAUSD project director Dominic Shambra, attorney David Cartwright, the law firm of O'Melveny & Myers, and a group including Art Gastelum, Jose Legaspi, Dan Neiman, and others who would eventually emerge as Temple Beaudry Partners/Kajima, or their principals or employees. Such a purported conspiracy is alleged to consist of an agreement between the conspirators to violate the laws and procedures governing public works contracts and environmental matters, including those found in

the Education Code, Penal Code, Government Code, Health and Safety Code, and others. The alleged purpose would be to manipulate the Belmont Learning Complex project to enhance the professional status of the conspirators and ensure improper profits or monetary benefits.

However, this highly speculative theory of a widespread conspiracy of most of the key actors in the BLC project does not meet the stringent evidentiary requirements for a criminal conspiracy prosecution.

B. Conspiracy Law (Penal Code section 182) and its Requirements

Penal Code sections 182(a)(1), (4), and (5) provide:

> If two or more persons conspire:
>
> To commit any crime....
>
> (4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.
>
> (5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws….
>
> They are punishable as follows ....[388]

A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit an unlawful act and with the further specific intent to commit that unlawful act, followed by an overt act committed by one or more of the parties for the purpose of accomplishing the unlawful object of the agreement.[389]

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[388] Penal Code section 182 provides for various potential felony punishments.

[389] CALJIC No. 6.10; *People v. Swain* (1996) 12 Cal.4th 593, 600.

The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved. It is not necessary to show a meeting of the alleged conspirators or the making of an express or formal agreement.[390] However, association alone does not prove membership in the conspiracy. Evidence that a person was in the company of or associated with one or more other persons alleged to be members of the conspiracy is not, in itself, sufficient to prove that the person was a member of the alleged conspiracy.[391] Finally, the commission of an act in furtherance of a conspiracy does not itself prove membership in the conspiracy. Evidence of the commission of an act that furthered the purpose of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of the alleged conspiracy.[392]

Section 182(a)(1) makes criminal a conspiracy that has as its object the commission of *any* crime. Under recognized California conspiracy law, a conspiracy to commit even a *misdemeanor* criminal offense can also be a separate felony crime of conspiracy. However, such a conspiracy prosecution cannot be sustained unless it can be established that the alleged co-conspirators, not only specifically intended to agree to commit a particular offense, but that they intended to commit the elements of that offense. The agreement must have as its object conduct constituting a target crime. Lacking that proof, such a conspiracy prosecution will fail.[393]

Less clear is the effect of the language in Penal Code section 182(a)(5) and whether an act, arguably injurious to public health, but not amounting to a violation of the criminal law, can constitute the object of a criminal conspiracy in California. No case law was found that specifically addressed the issue. Leading commentators have concluded: "Although the phrase referring to an act injurious to public health or morals has occasionally been cited as the basis of a conviction, it is doubtful whether it serves any significant purpose. The object of the conspiracy will almost invariably be within the terms of some specific criminal statute, and therefore can be charged under the more inclusive provision on conspiracy to commit 'any crime.'"[394]

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[390] CALJIC No. 6.12.

[391] CALJIC No. 6.13.

[392] CALJIC No. 6.18.

[393] *People v. Swain* (1996) 12 Cal.4th 593; 1 Witkin and Epstein, *California Criminal Law*, 3d Ed., Elements, § 68 *et seq*.

[394] 1 Witkin and Epstein, *California Criminal Law*, 3d Ed., at 304.

In any event, assuming a conspiracy prosecution based on target conduct not amounting to a crime was possible, the evidence would have to establish that the co-conspirators specifically intended to commit acts "injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws."[395]

C. Overview of BLC Conspiracy Allegation

The theory of an elaborate and large-scale conspiracy among key BLC figures can be described as follows (for analytical purposes, we will provide what this Office perceives to be the most favorable possible description of the "evidence" pointing to conspiracy):

Under this theory, development director Dominic Shambra, for whom retirement from LAUSD was imminent, would have entered into such a conspiracy in order to build an extravagant edifice that would stand as a monument to his project developer acumen, and to provide a vehicle for currying favor with prominent people in school development circles where he would be soon working as a consultant.

Attorney David Cartwright would have participated in the purported conspiracy so that he could advance, not only the interests of LAUSD, but also those of Kajima, a major client of O'Melveny & Myers, thereby supposedly enhancing his status at O'Melveny & Myers as a valued partner.

Each of the individuals who eventually became Temple Beaudry Partners/Kajima, or their associates, allegedly entered into the conspiracy in order to derive various financial benefits by finessing the Belmont Learning Complex construction project for fees, payments, and profits.

This conspiracy theory alleges a union of LAUSD, through Dominic Shambra, David Cartwright, O'Melveny & Myers, and others, with all those associated with Temple Beaudry Partners/Kajima, in which unified entity each of the participants was working for his or her own improper personal benefit, to the detriment of the LAUSD and the public. It is claimed that the existence of such an overall conspiracy can be inferred from a number of asserted events and

[395] Penal Code § 182(a)(5).

circumstances. This theory asserts that it might be possible to find evidence to prove the following circumstantial facts:

Shambra and Cartwright purportedly orchestrated an overstated appraised value for the 24-acre property, by omitting cleanup costs and by improper sharing of comparable sales data. Thus the LAUSD, and the taxpayers through the California State Allocations Board, allegedly paid too much for the land, which LAUSD would not have purchased if all facts had been known. Although these appraisals and the land purchase predate Temple Beaudry Partners/Kajima, one of the principals of Temple Beaudry Partners, Dan Neiman, was also the managing partner of S-P, the seller of the land. It is claimed that payments the seller made out of escrow during the purchase transaction enabled Dominic Shambra to support his unit within the LAUSD and hire his friend Wayne Wedin. By allegedly understating the environmental problems, Dominic Shambra and David Cartwright permitted the project to proceed improperly.

The alleged conspirators purportedly reaped benefits throughout the duration of the project by understating the environmental problems, which if known would have derailed the project. But those problems were concealed, and as a result, the project commenced without a fund to handle environmental contingencies. It is asserted that a plan for a methane barrier based on earlier environmental reports was abandoned, and that the LAUSD's environmental experts were sidestepped by Shambra. Further it is claimed that the various environmental regulatory agencies and the Fire Department did not learn of the methane and hazardous waste risk because of the actions of the conspirators. When the problems eventually surfaced, the project was shut down, but proponents of the conspiracy theory assert that the project would have been completed if the improper concealment of these matters had not been discovered.

Alleged improprieties in the LAUSD developer selection process involving David Cartwright, Dominic Shambra and others supposedly show that the selection process was a sham, and that the project had been steered to Temple Beaudry Partners/Kajima.

David Cartwright allegedly drafted a one-sided Disposition and Development Agreement that benefited Temple Beaudry Partners/Kajima because standard contract provisions were omitted and the Disposition and Development Agreement allocated all the environmental risk to LAUSD. Appropriate arms-length dealing between LAUSD and Temple Beaudry Partners/Kajima was allegedly undermined by purported conflicts of interest. It is claimed that with Dominic Shambra and David Cartwright on the same side of the table as Temple Beaudry Partners/Kajima, the

Disposition and Development Agreement became an artifice to deceive the LAUSD Board and to take advantage of LAUSD and the public.

The Certificates of Participation security offering, which allegedly contained misrepresentations by Dominic Shambra and David Cartwright, generated legal fees for Cartwright's law firm and enabled Shambra to pay Temple Beaudry Partners/Kajima, Wayne Wedin, and others.

Finally, it is claimed that the handling of the partial payments and the advice by David Cartwright to LAUSD fiscal managers to relax their vigilance on payments for claimed work because of the Guaranteed Maximum Price shows collusion between Dominic Shambra, David Cartwright, and Temple Beaudry Partners/Kajima's principals and agents to the benefit of Temple Beaudry Partners/Kajima and to the detriment of LAUSD and the taxpayers.

D. Analysis and Conclusion

A large-scale conspiracy by numerous major participants in the Belmont Learning Complex project may present a superficially appealing scenario to concerned citizens justifiably angry over a $160 million high school that has yet to serve Los Angeles students. However, neither anger nor disappointment is sufficient to justify felony prosecution.

In a complex conspiracy matter, the prosecutor cannot proceed without solid and admissible evidence which: (1) will prove each legal requirement of a criminal conspiracy as to each defendant; and (2) will prove each element sufficiently to convince every member of the jury beyond a reasonable doubt.[396] The highly speculative theory of a widespread conspiracy of most of the key actors in the BLC project simply does not meet the rigors of proof required of a criminal conspiracy prosecution.

Absence of direct evidence of agreement. First, regarding the requisite proof of agreement, there is no direct evidence (such as a witness statement and eventual testimony in court), from any purported co-conspirator, insider, or knowledgeable witness, to prove the existence of such a criminal conspiracy. Of course, conspirators attempt to conceal inculpatory evidence. However, prosecutors experienced with cartels and other widespread conspiracies know that in cases involving

[396] *See generally*, Chapter III *supra*.

large groups of conspirators, there are many potential witnesses with some knowledge of the agreement — including co-workers, clerical staff, disgruntled ex-employees, business competitors, unguarded friends or family members, and many others.

Given the supposed vast scope of this conspiracy, it is highly significant that no witness with any direct knowledge or evidence of such an agreement has been found or has come forward. Given the importance and notoriety of this matter, one or more witnesses of this kind would have solid incentives to come forward (including leniency, possible celebrity, and other rewards), if such a large conspiracy existed. The absence of any such witness forcefully argues against the plausibility of a large circle of conspirators. This Office welcomes information from any witness to this alleged conspiracy, but eighteen months of exhaustive and well-publicized investigation has produced no such witness to date.

Problems with the circumstantial "evidence" of conspiracy. Conspiracy agreements can also be proved with circumstantial evidence, although the prosecutor's task is much more difficult in such cases. However, in this matter, the entirety of the circumstantial evidence available to support such a conspiracy is insufficient to proceed.

Virtually every fact ascribed as potential "evidence" of conspiracy in this matter also has a reasonable non-criminal explanation, such as ordinary business and profits motives, good faith but mistaken business judgment, inexperience in complex projects of this kind, or the unique circumstances of a project which all acknowledge was novel and unprecedented. These alternative explanations are highly significant in this context: In a criminal prosecution, if there are two reasonable interpretations of circumstantial evidence, one pointing to innocence and the other pointing to guilt, the fact finder is compelled to follow the interpretation that points to innocence.[397]

The numerous suppositions and allegations comprising the grand conspiracy theory each has one or more critical flaws which render it of little value as circumstantial evidence of the alleged criminal conspiracy. An illustrative list of such proof problems, drawn from the list of conspiracy "evidence" provided above, demonstrates the ease of making such allegations and the difficulty of adequately supporting them:

[397] *See* CALJIC No. 2.02.

• The theory of planning developer Shambra's career-enhancement motive is indistinguishable from the career incentives of excellence and good business reputation which motivate most executives. Such motivation is not itself a crime, and it tells us nothing of illegal conduct to advance the conspiracy.

• Attorney Cartwright's alleged motive — to curry favor indirectly with a client of his large law firm — assumes facts not in evidence, including that Cartwright (already a senior partner) needed to curry such favor, that his public efforts could somehow favor Kajima without risking detection, and that he took other action covertly favoring Kajima, when no such action has been identified which cannot be explained on its own merits.

• The alleged circumstantial evidence of overpayment for the 24-acre parcel and understating of the environmental harms ignores the numerous levels of review by those who could not have been co-conspirators. It is also inconsistent with the evidence that indicates legitimate and good faith differences of opinion as to the extent of the environmental concerns and the mitigation remedies for those problems.

• The supposed evidence of a "sham" or "rigged" selection process is inconsistent with the many facts detailed in Chapter VI, *supra*, regarding the thorough process of developer selection, including the multiple levels of review by the Oversight Committee members and Board members who could not have been members of the conspiracy. It also ignores the equally or more plausible explanation that the TBP partnership bid was superior to and met the Board's specifications better than the two competing bids.

• The alleged factual significance of the supposedly "one-sided" development agreement ignores what many unbiased witnesses will testify were sound business reasons for each and every unusual contract term. This also presupposes a secret conflict of interest involving attorney Cartwright and Kajima, when in fact the Board had full knowledge of the O'Melveny/Kajima relationship and had knowingly waived any such a conflict, indicating the Board would have been entirely alert to biased efforts favoring Kajima.

• Allegations of misrepresentations and omissions in the offering of the COPs simply do not meet the legal standard for securities violations (*see* Chapter VII, *supra*), and theories of funds being used as co-conspirator payments are unaccompanied by any proof of such improper payments.

• Planning director Shambra is said to have been bribed by Kajima for his role in helping advance this conspiracy; yet the only evidence of value passing from Kajima to Shambra has a completely plausible — and indeed more likely — non-criminal explanation.

• The purported evidence of mishandling of or relaxed vigilance on progress payments does not effectively address alternative business explanations and the impact of the Guaranteed Maximum Payment term on the usual payment process.

• Finally, conspicuous by its absence from the asserted circumstantial evidence is any proof of a direct motive or reward, such as immediate payoffs, kickbacks, bribes, or employment. Instead, in order to establish motive, this conspiracy theory relies on poorly defined long-term benefits involving the sort of career enhancement advantages and hoped-for business opportunities that are inherent in all business activities.

Absence of proof of target crime. In addition to the absence of evidence establishing the existence of an agreement, the evidence also fails to establish the required target crime or crimes which must be the object of a criminal conspiracy. The District Attorney's Office has reviewed the evidence collected by other agencies and has conducted its own extensive independent investigation. The numerous allegations of criminal misconduct are considered in detail in this report (*see* Chapters IV through VIII, *supra*). As this Office concludes there is insufficient evidence to establish any underlying target crime that could serve as the object of an alleged conspiracy, this requisite element of proof of a criminal conspiracy is likewise missing.

Even the theoretical possibility of a conspiracy proved under Penal Code section 182(a)(5) is unsupportable on these facts. Of the target acts addressed by this provision — including acts "injurious to the public health, [or] to public morals," or acts that "pervert[ed] or obstruct[ed] justice, or the due administration of the laws"[398] — only the "public health" theory is at all related to the present facts, and as no actual injury to public health has resulted or will result from the behaviors in question, this theory fails also.

Conclusion. Under the stringent legal standards necessary to prove beyond a reasonable doubt the felony crime of conspiracy, this Office concludes the present evidence is insufficient to establish the existence of a broad conspiracy involving most of the major participants in the Belmont Learning Complex project. Accordingly, prosecution on such a theory is declined.

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[398] Pen. Code § 182(a)(5).

Chapter X

LESSONS FROM THE BELMONT LEARNING COMPLEX PROJECT

Chapter Synopsis

- The Belmont Task Force has identified unsound practices and serious problems with the LAUSD school development process, although these problems will not support criminal prosecution in this matter. The District Attorney's Office has an obligation to share lessons from the Belmont Learning Complex which the office has uncovered in the course of its investigation.

- The lessons identified in this chapter include: the importance of an open and efficient LAUSD school development process to restore public confidence; the significance of full adherence to California's open meeting laws and policies; the need for effective oversight of LAUSD by its Inspector General; the significance of assuring environmental safety in school projects from the earliest stages of such projects; the importance of implementing new legislation giving DTSC clear jurisdiction over school site mitigation plans; the reasons LAUSD should carefully re-evaluate the use of the problematic "mixed use" and "design-build" concepts in school development; methods for ensuring full compliance with California securities laws; and the need for much greater clarity of terms in LAUSD school development contracts.

- The Belmont Learning Complex project has been a continuing public tragedy of mistakes, misfortune, missed deadlines, and mishandling of the educational interests of our children. It is essential that LAUSD learn the lessons from the Belmont Learning Complex and develop an improved school construction process to restore public support and better serve the educational needs of the district's students.

A. Introduction

The obligation to report lessons from the Belmont Learning Complex project. The primary focus of the Belmont Learning Complex investigation has been to determine whether felony violations of law have occurred and could be proved. This focus properly reflects the District

Attorney's constitutional obligation for felony prosecutions in our California system of justice. However, in the investigation to fulfill that obligation, the Belmont Task Force staff has identified unsound practices and serious problems with the LAUSD school development process.

Although these practices and problems will not support felony prosecution in this matter, the District Attorney's Office finds that they contributed materially to the failure of the Belmont Leaning Center project. As the District Attorney shares with other community leaders the collective responsibility to protect the public interest, it is appropriate for this Office to report its observations and conclusions arising from the present investigation.

This is also appropriate because our community demands and deserves answers to the question of what went wrong with the Belmont Learning Complex. Our taxpayers will ultimately pay the $160 million bill for a school that has yet to serve a single student. Our children continue to be bused across Los Angeles for want of adequate local facilities, spending precious time on the freeway instead of in the classroom or on the playing field. Our community as a whole has a critical interest in a quality education for future generations, and that interest has been thoroughly frustrated in this matter.

Future LAUSD school development projects must not repeat the mistakes of the Belmont project. A vast sum, estimated at between $4 billion and $6 billion, is now available in new funding for LAUSD to develop and build new schools; in excess of 90 new schools are contemplated; mixed-use concepts and other innovative solutions are being planned.[399] It is imperative that lessons learned from Belmont be applied to this next vital phase of school development in our community.

Fulfilling its first obligation, this Office has provided its assessment of potential criminal liability in this project, detailed above in the first nine chapters of this report. In this chapter the District Attorney's Office offers the lessons which should be drawn from this experience regarding the larger public issue of how to improve our flawed process for developing new schools for our children.

[399] *See, e.g.*, "L.A. Unified Brings Style to School Building Boom," *Los Angeles Times*, December 23, 2002.

B. An Overview of LAUSD School Development Issues and Problems

LAUSD school development issues and problems, generally. School development projects in communities such as ours are often controversial. The projects typically take place in in urban settings with difficult land acquisition problems. Large parcels are needed, especially for secondary schools (full-service high schools typically require at least seventeen acres), and such parcels are often unavailable or prohibitively expensive. Existing residents or occupants of such urban parcels must be displaced in some fair manner, but at the same time, cost considerations militate for a certain degree of secrecy during negotiation for acquisition of such land. And, by no means least, acquisition of land for potential school purposes involves especially sensitive environmental concerns given the primacy of safety for our children.

In addition to general land acquisition problems, in a district such as LAUSD school development projects must balance various competing demands for limited resources within the district. For example, funds originally earmarked for air conditioning in the San Fernando Valley were instead used to help acquire the 11-acre parcel at Belmont. The enormous scope of LAUSD's operations, the challenges of properly allocating an $11 billion annual budget, and the diversity of LAUSD's communities, each with differing interests and influence — all contribute to the level of controversy concerning school development decisions.

Adding to this challenge, school development projects in districts such as LAUSD must often strike a balance between two fundamentally different development approaches. One approach, typically used by institutions of higher learning such as universities, emphasizes the importance of building noteworthy facilities which, although expensive, will have lasting beauty and permanent value. The competing approach de-emphasizes aesthetics and instead focuses on a utilitarian policy of maximizing school space and minimizing cost.

As LAUSD is a public entity governed by an elected board, it is vital that the district's school development decisions maintain a high level of public confidence. The Belmont Learning Complex experience has demonstrated that once a project loses the necessary level of public confidence, the project is likely doomed to failure. This adds an additional challenge: A complex planning and development process such as this requires years of continuous effort, and this timeframe often extends across changes in the political and economic climates of Los Angeles. The ultimate decision-makers at LAUSD are elected officials with terms of office shorter than the duration of such projects. Because of the enormous size of LAUSD, its board members are called upon to

manage an agenda that is overwhelming in both size and complexity. In such circumstances, the board must rely extensively on staff recommendations and can give only cursory consideration to far-ranging decisions having profound economic and social consequences.

In short, school development in the context of LAUSD and our community is an enormously complex process with numerous challenges and few simple solutions. These difficult circumstances make it crucial that the district develop an open and efficient school procurement process that promotes public confidence and withstands multiple competing pressures.

Recommended general policies for LAUSD school development. As Supreme Court Justice Louis Brandeis often noted, "Sunshine is the best disinfectant."[400] The most vital attributes of a better school procurement process for LAUSD will be demonstrated openness and accountability. Only with a process fully "in the sunshine" will the public's trust be maintained and the failure of the BLC project be averted in future projects.

Especially in light of the inevitable controversies in urban school development, LAUSD must recognize that it is vital to earn and maintain the public's trust. Adherence to both the letter and the spirit of the public meeting requirements of the Brown Act, Government Code section 54950 *et seq*., is a important step in that direction. Chapter V of this report details the successful efforts of the District Attorney's Office to ensure full Brown Act compliance by LAUSD and to promote greater openness in this process generally.

In a similar vein, LAUSD should also institute formal procedures to avoid circumstances which call into question the propriety of its school development dealings. That mandate should go beyond technical compliance with the prohibitions in California's conflict of interest law, Government Code section 1090 *et seq*. Merely avoiding criminal acts is not enough; the process should avoid even the *appearance* of favoritism, cronyism, or self-dealing. LAUSD's Office of the Inspector General can and should assist LAUSD in identifying and avoiding such circumstances of apparent conflicts of interest.

As a final general matter, in its planning process LAUSD should adopt a development philosophy that is realistic in light of the daunting challenges of building schools in our urban community. LAUSD should exercise caution in the ambition and scope of its projects, recognizing

[400] *See, e.g.,*Justice Brandeis quoted in *Kreutzer v. A.O.Smith Corp.* (7th Cir.1991) 951 F.2d 739, 749.

the limits of the district's expertise and capabilities, and acknowledging the necessity of full public support for its projects. This is not to say the district must avoid all innovation or projects of large scale. But LAUSD should consider whether its resources and public support are adequate before it embarks on "cutting edge" development projects with extravagant budgets and unproven premises. In the case of the Belmont project, a simpler and less controversial concept — with greater emphasis on careful planning and property testing — would likely have resulted in the actual delivery of a much-needed (if less exotic) high school.

Effective oversight by the LAUSD Inspector General is crucial. The Belmont Learning Complex project has forcefully demonstrated that — like any public body spending billions of public dollars — LAUSD needs effective oversight. A strong and independent Office of the Inspector General is essential to restoring public confidence in LAUSD and its school development process.

The Inspector General's Office functions as an independent investigative agency within LAUSD and is answerable only to the Board. Because of its independence and its mandate to uncover fraud and corruption within LAUSD, the Inspector General's Office serves as a much-needed disinterested watchdog over LAUSD operations. Given the size and scope of LAUSD's contemplated new school development and building plans — and the potential for mismanagement or fraud in such vast spending programs — a disinterested watchdog of this kind is critical.

The Inspector General's Office and its personnel also bring valuable expertise that may not be readily available to LAUSD otherwise. Many Inspector General investigators are former FBI special agents or former bank investigators with extensive experience in investigating white collar crime and in the application of effective financial management practices used in federal projects and in private industry.

Any improvement in the unfortunate track record of LAUSD in the Belmont matter will depend in large part on the effective oversight of the Inspector General's Office in guarding against mismanagement and fraud.

C. Environmental Lessons

Failure to assure environmental safety from the start will always jeopardize a school project. In school development projects, safety concerns will always be paramount, and these

concerns are entirely appropriate. The public will continue to insist on the highest levels of safety for its school children, and the public is willing to pay for that safety. Examples from the past and present demonstrate the importance of these safety concerns and the public's support for them. The 1933 Field Act, imposing earthquake safety standards on public school buildings, was enacted in response to the disastrous Long Beach earthquake and the tragic losses of life and property it caused. The Field Act materially increases costs of school construction, but few if any in our community challenge those costs. Similarly, recent efforts to complete the Belmont project are calling for comprehensive, but expensive, methane barrier systems to ensure the safety of the school children. The public demands that no reasonable expense be spared to ensure schools are safe.

Because of the public's paramount interest in school safety, the failure to adequately address environmental safety *in the early stages of a project* will imperil the success of any school development project. Reports of potential or actual environmental problems at school sites resonate with the media and the public, and dramatically undermine public support for projects. The Belmont experience shows that public support may not be easily revived once safety criticisms are publicized, making it crucial that LAUSD get environmental safety issues right the first time.

LAUSD managers of a public school development project should accept nothing less than demonstrated environmental safety for a potential school site. Corners cannot be cut in this regard. Inaction or lengthy further study are unworkable strategies once a project has been begun.

Environmental safety issues must be fully resolved at planning stages. The adage that "an ounce of prevention is worth a pound of cure" applies with special relevance to the Belmont Learning Complex project and LAUSD school development generally. The "mitigate as needed" strategy employed at Belmont was a formula for failure. Given the overriding public concern over school safety, environmental problems such as were encountered at Belmont cannot be adequately resolved while under the pressure of cost penalties for delay. An after-the-fact mitigation solution developed under those pressing circumstances is likely to be perceived as inadequate or a cover-up for failed planning.

Instead, the environmental safety issues must be fully and effectively resolved at the planning stages of new schools. LAUSD must develop and follow strict environmental safety protocols, with built-in redundancies and oversight, so that the public receives adequate assurances of the environmental safety of schools from the earliest stages of the development process. In this regard, the state Legislature and environmental agencies such as DTSC should consider whether

legislation is needed to clarify or strengthen the applicability to school districts of the federal and state requirements for environmental studies and testing as preconditions to project approvals.

New legislation ending jurisdictional confusion should be adequately implemented. During the development of a mitigation strategy for the BLC project, LAUSD sought plan approval from the Los Angeles Fire Department. While helpful, the Department maintained that under then-existing law it did not have jurisdiction to evaluate such plans. This jurisdictional confusion caused delay and uncertainty and ultimately contributed to the shut-down of construction at BLC.

In response to this problem, the state Legislature revised the Education Code (section 17213.1 et. seq.) to vest regulatory oversight and approval authority for school site mitigation plans with the state Department of Toxic Substances Control (DTSC).[401] This legislation was specifically enacted to address the methane-approval jurisdiction problem in the Belmont development process. Properly implemented, this new approval process will prevent similar lapses in the supervision and remediation of this type of environmental problem in school construction. LAUSD should implement a protocol to make full and prompt use of DTSC oversight and approval authority.

However, even within this new regulatory framework, DTSC must still rely on the testing, analyses, and conclusions of experts retained by LAUSD. The effectiveness of DTSC oversight will largely depend on the quality of the information that has been supplied to that agency. Information supplied by experts invariably involves some measure of professional judgment. LAUSD must endeavor to retain and utilize the most respected and reputable experts and consultants available, and those experts and consultants must be above any reproach based on possible issues of expertise or conflict of interest. And on key issues central to school safety, LAUSD should obtain redundant advice ("second opinions") to ensure the accuracy of environmental conclusions.

The Belmont experience underscores the importance of avoiding potential conflicts of interest, and even the appearance of such conflicts, in the retention of such experts. And where potential conflicts are arguably unavoidable (such as with a unique expert, for example), any such potential conflict should be fully and publicly aired and should be the subject of Board discussion and appropriate formal waivers. Without a stringent protocol of this kind, project opponents will have an effective basis to attack the conclusions of LAUSD experts, regardless of the true merits of their expert conclusions, thus undermining essential public confidence in the expert advice.

[401] *See* SB 162 (Escutia) and AB 387 (Wildman), enacted during the 1999 Session of the state Legislature.

LAUSD's Inspector General should make it a high priority to ensure that LAUSD establishes and follows a strict protocol governing the retention and use of these vital experts and consultants.

In sum, the Belmont Learning Complex experience has again demonstrated a lesson LAUSD should have heeded much more carefully: School environmental safety issues are of paramount importance to the public and are critical to the success of school development projects. Such issues must be addressed and fully resolved in a systematic, public, and conflict-free manner *prior* to the commencement of school construction.

D. Developer Selection Lessons

The limits of LAUSD expertise: novel "mixed-use" concepts and related design issues. The Belmont project applied a "mixed-use" planning concept, which at various times included: (1) a design feature in which the same structures that elevated the school academies would also provide space for retail commercial purposes; (2) a low-income housing component; and (3) provisions for sharing the athletic and recreational facilities between LAUSD and the City of Los Angeles. These proposed mixed uses may have represented imaginative attempts to reconcile the political, fiscal, and social forces shaping the Los Angeles urban school development project that was Belmont. However, the proposed mixed uses also greatly increased the complexity of the project, and the attendant controversy.

Serious challenges to the viability of the retail commercial uses were raised throughout the project and created considerable budgetary and design uncertainty. The overall fiscal impact of the project was dependent on uncertain projections from the retail component. Proposed retail uses potentially jeopardized the tax-exempt status of the securities issued to fund the school. Further, the joinder of low-income housing and the construction of a high school was novel and untried, as was the concept of sharing recreational facilities (notwithstanding its understandable appeal). Given that urban large-school development is inherently controversial, it was overly ambitious to inject numerous novel and untried mixed-use planning concepts into an already complex process.

While complex problems can sometimes be solved through innovation, LAUSD should evaluate its planning philosophy in light of a realistic assessment of the district and its limitations. The mission of LAUSD is first and foremost to educate. LAUSD is not in the business of planning commercial enterprises, nor does it possess substantial institutional expertise in mixed-use real estate development or similar complex business ventures. It is almost certainly unrealistic to expect

LAUSD to succeed in highly specialized and competitive commercial endeavors outside of its primary mission.

Recognizing that school development in our community is very difficult even with conventional designs — it has been over twenty-five years since the district successfully completed its last high school — LAUSD should carefully consider limiting the ambition and scope of its school development undertakings. The district should minimize the use of novel and untested designs which are certain to generate controversy and add to project complexity.

The "design-build" methodology caused serious problems in the BLC project. In the BLC project, LAUSD employed a "design-build" bidding process in which qualified bidders submitted their own solutions to meet what were only broad LAUSD design parameters. Advocates of the design-build approach claim various benefits over the more traditional "design-bid-build" method, in which the lowest bid is selected from qualified builders bidding on the same exact design. Design-build is said to be faster and less costly, and is thought to promote creative results. Design-build is widely used for private development projects and is also used for some public works projects.

However, the design-build approach also carries significant risks and disadvantages that plagued the Belmont Learning Complex project, and these detriments should be studied carefully by LAUSD. School building is frequently controversial, and LAUSD school building is especially controversial. The design-build process carries grave potential for mischief and for undermining public confidence in the integrity of the process. Design-build does not make use of competitive bidding where prospective builders bid on the same design. Instead, each prospective builder offers its own unique solution with its own unique price. To a greater extent than with other systems, the contract award criteria in the design-build system are subjective and more difficult to evaluate and to justify later. And of course, price is not determinative, unlike the more traditional design-bid-build method.

The Belmont project demonstrated that these design and price questions in the design-build process can arouse public suspicions which cannot be easily allayed by after-the-fact descriptions of an inherently subjective process. The design-build approach makes the vital question of how the developer was selected highly susceptible to second-guessing and conspiracy theorizing by commentators and critics. Project price is suspect because there has been no "competitive bidding" as the public usually envisions it. Project design is suspect because design decisions are subjective, yet in the design-build model, that "suspect" design is the determinative factor in the developer

selection decision. As a result of these potential targets for popular suspicions, a project using this approach is more vulnerable to a critical loss of public confidence, even if there has been no wrongdoing.

The continued use of the design-build approach is a fundamental policy decision for the LAUSD Board, and this decision should be the subject of extensive and open debate and careful consideration by the Board after adequate public input. If LAUSD determines to continue the use of the design-build approach, it should minimize the considerable risks of that approach by:

- Employing formal written protocols and requiring strict adherence to required time schedules;
- Insisting on short time periods for design and negotiations;
- Ensuring adequate detail in the initial design and cost criteria;
- Requiring scrupulous disclosure of conflict of interest issues — both actual conflicts and those which could create the appearance of conflicts of interest; and
- Vigorously investigating any potential conflicts using the Office of the Inspector General.

The mixed-use concept and the design-build approach together added materially to the controversy, uncertainty, and complexity of the Belmont Learning Complex project. These strategies demanded additional and somewhat extraordinary management expertise, and ultimately increased the potential for project failure. The public viewed mixed-use and design-build with suspicion, and these choices provided ample ammunition for Belmont critics and detractors to attack the project. The lessons from the use of the mixed-use concept and the design-build bidding approach in the Belmont project should be acknowledged and carefully considered in future LAUSD planning for school development.

E. Securities Law Lessons

The role of Certificates of Participation in LAUSD school financing. LAUSD provided for the construction financing for the Belmont Learning Complex through the issuance of

Certificates of Participation (COPs), a bond-like security enjoying tax-exempt status. COPs are now widely used for financing school construction in California, and their use at Belmont was not unique. COPs provide important financing flexibility and other advantages for the school districts of our state. However, COPs are to some extent inconsistent with traditional concepts of public school financing. The use of COPs avoids the taxpayer approval necessary to issue more traditional school construction bonds, and in some circumstances could enable a project to move forward that may be otherwise lacking in public support. The tax-paying public is largely removed from the process in COPs funding.

LAUSD and the public it serves should conduct an open dialogue on whether this alternative funding mechanism best serves our community in that respect. It may be that the funding flexibility of COPs in helping open new schools outweighs the reduced public participation in the process; but that result should not be assumed without adequate policy discussion and scrutiny.

Ensuring compliance with California securities regulations. The regulatory mechanism of California's corporate securities laws is based on meaningful disclosure of potential risks to investors, who are thus enabled to make their own informed investment decisions. State law prohibits issuers from making intentional or criminally negligent material misrepresentations or omissions in offering or selling securities. In the BLC project, the issues raised concerning securities law arose as by-products of the confusion over retail "mixed-use" and the potential environmental problems. LAUSD can ensure continuing compliance with California law by eliminating confusion over those issues using the strategies outlined above, including thorough pre-construction planning, adequate environmental testing, and appropriate public scrutiny and participation.

F. Subcontractor Billing Lessons

LAUSD development contracts must employ much greater clarity of terms. The subcontractor billing disputes arising in the BLC project can be readily avoided through a rigorous policy of greater clarity of terms in vendor contracts. Issues such as payment schedules and front-loading of profit in partial payments should be negotiated and specifically addressed in each contract agreement.

In the BLC project, the genesis and impact of the overbilling allegations are unclear because these issues did not arise until after LAUSD unilaterally breached the contract and was in a posture of minimizing the consequences of that breach. The subcontractors were generally ready and willing

to complete the work for the agreed upon contract price. Further, performance bonds secured the subcontractors' obligations. The billing issues arose over whether the subcontractors overbilled for partial payments and thus were seeking to be paid too soon. Specific contract terms can eliminate ambiguities and controversies over such payments.

It should be noted that if LAUSD insists on more restrictive progress payments and greater protection from overbilling risks, this may have an impact on LAUSD overall project costs. To the extent that a project's daily cash flow requirements must be financed by the developer, the general contractor, and the subcontractors, these financing costs will ultimately be passed on to LAUSD as vendors build such costs into their contract bids. It may also result in reduced competition to the extent that some smaller contractors may be unable or unwilling to work under a requirement of greater self-financing. These policy concerns should be considered carefully by the LAUSD Board as part of the development of a new protocol requiring greater contract specificity to avoid such controversies.

G. Conclusion

In summary, the Los Angeles Unified School District experience with the Belmont Learning Complex has been a continuing public tragedy of mistakes, misfortune, missed deadlines, and mishandling of the educational interests of our children. LAUSD, and all of us as members of the Los Angeles community, owe it to our children to learn the important lessons on building schools that have been taught at such cost in the Belmont project. LAUSD must improve its school development process so as to restore public confidence and to assist in the significant new phase of school construction which is now on the horizon.

CONCLUSION

The Los Angeles County District Attorney's Office Belmont Task Force has completed its criminal investigation of the development and construction of the Los Angeles Unified School District's Belmont Learning Complex.

Based on its thorough review of all relevant facts and legal issues, as detailed in this report,[402] the District Attorney's Belmont Task Force concludes that the available evidence fails to establish the existence of any felony violations of California law in the development or construction of the Belmont Learning Complex. Accordingly, prosecution is declined.

However, in light of the pressing need for school construction in our community, it is vital that the Los Angeles Unified School District learn from the lessons of the failed Belmont Learning Complex project, including the lessons detailed in Chapter X of this report.

The LAUSD experience with the Belmont Learning Complex has been a continuing public tragedy of mistakes, misfortune, missed deadlines, and, ultimately, mishandling of the educational interests of our children. LAUSD must learn from the mistakes of this experience, or it will be condemned to repeat those mistakes in the extensive school construction projects it will undertake in the near future.

New school development in Los Angeles is a complex process with many challenges. For this reason it is all the more crucial that the Los Angeles Unified School District apply the lessons from the Belmont Learning Complex and develop an improved school construction process which is open, thorough, efficient, and unquestionably honest. Only in this way will it be possible to restore public confidence and fully meet our obligation to our children.

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[402] *See* Chapters I through IX, *supra*.

APPENDIX A

Chronology of Key BLC Events

Chronology of Key BLC Events

1985-1992	LAUSD[403] begins search for downtown site; evaluated 30 sites.
August 1989	LAUSD identifies 11 acre site as preferred site.
August 1989	State California Division of Oil and Gas (DOG) informs LAUSD that 11 acre site is located over an oil field, and warns of risks and hazards of building on the site.
April 1990	David Cartwright writes letter to LAUSD Gen. Counsel Richard Mason outlining the several environmental safety issues for the District to consider, including: possible gas build-up, shutting down the wells, the difficulties of locating abandoned wells, the problems of building over the wells and costs associated with the fixes.
June 14, 1990	LAUSD Building Cmte. meets concerning the environmental issues.
July 10, 1990	DOG Regional Dir. Richard Baker writes letter to LAUSD re recommendations for safely building a school on the 11 acres.
June 1993	LAUSD initiates condemnation proceedings for 11 acre site; Cartwright gets call from Shimizu Corp. re selling the adjacent 24 acres, conditioned on closing by March 1994.
August 1993	LAUSD Environmental Health and Safety Branch completes a Preliminary Site Assessment which confirms the 24 acre parcel is in close proximity to LA City oil field.
November 15, 1993	LAUSD Board approves the mitigated negative declaration.
December 1993	LAUSD acquires second parcel, the "Shimizu Site," by entering into land purchase agreement. Shimizu gives LAUSD all available information and insists property be purchased "as is." LAUSD concludes the "as is" provision is in the District's best interest.

[403] References to LAUSD mean either the Board, a specific division or department (or its director) within the District, the Superintendent, or any combination of these constituent parts.

February 18, 1994	Cartwright and LAUSD executives ask Shimizu to assume the District's responsibility for hiring and paying for an environmental consultant to prepare a Phase II report; Shimizu agrees, and hires ENV America. LAUSD sets the scope of work which includes methane gas testing.
March 1, 1994	Board votes to develop the 35 acre site as a joint venture with the private sector to produce a mixed-use development.
March 15, 1994	Escrow closes on Shimizu Site.
March 21, 1994	LAUSD combines 11-acre and 24-acre sites for a high school and possible retail/housing center; Board approves the venture.
September 9, 1994	LAUSD issues RFP to developers.
April 6, 1995	Cartwright sends letter to LAUSD's GC Mason re O'Melveny & Myers prior dealings with Kajima, a business partner of TBP and the potential conflict of interest.
April 24, 1995	LAUSD forms Evaluation Committee re developer selection.
June 9, 1995	LAUSD's Evaluation Cmte. recs. that TBP be selected as developer.
August 21, 1995	LAUSD Superintendent. recs. TBP be selected for exclusive negotiations as developer.
September 12, 1995	Cartwright sends second letter to LAUSD's GC Mason re potential conflict of interest.
September 18, 1995	Board selects TBP for "exclusive negotiations" toward eventual selection as developer.
October 1995	Board formally ratifies conflict of interest waiver.
January 1, 1996	AB 481 (Goldsmith), authorizing the "design-build" approach becomes effective; was championed by LAUSD OPD Dir. Dominic Shambra and Cartwright.

August 5, 1996	LAUSD signs MOU with TBP.
1996	LAUSD retains expert to prepare EIR for BLC; Cartwright and othersprovide advice to the Board on responding to comments on the draft EIR
November 1996	During final negotiation over DDA between LAUSD and TBP, TBP was unwilling to guaranty environmental clean-up for the price LAUSD was willing to pay. Thus, LAUSD assumed the financial responsibility for that clean-up.
November 18, 1996	Board publicly debates and approves Final EIR. Document calls for a "mitigate-as-needed" strategy respecting methane gas and its mitigation.
November 25, 1996	Richard Lui of LAUSD Environmental Health and Safety sends e-mail to Ray Rodriguez of LAUSD Office of Planning and Dev. stating that it appears from the methane survey of the 24 acres that methane is present in the area where the buildings are located. He believes it looks like a methane ventilation system may be required.
Late 1996	TBP contacts John Sepich of Methane Specialists and requests general proposal for methane barrier.
January 5, 1997	John Sepich submits a preliminary proposal estimating cost for methane barrier for *all* buildings, in the range of $2 million.
January 7, 1997	LAUSD gives Law/Crandall approval to begin testing work to resolve methane question *south* of Colton.
January 14, 1997	Law/Crandall instructed to comprehensively review previous environmental studies.
January 21, 1997	Meeting at LA Fire Dept. including Insp. Joe Gould, TBP, T/K, Law/Crandall, McClarand/Vasquez and possibly LAUSD.
March 6, 1997	Ken Reizes (TBP/Kajima) letter to Fire Dept. requesting its approval of methane mitigation plan.

March 10, 1997	Law/Crandall March Report states methane is present north of Colton, but 24 acres to the south were "unaffected."
April, 21 1997	DDA reviewed by Oversight Cmte, by Board, and independent review team; Peter James (Baker & Hostetler) provides additional legal opinion.
April 24, 1997	LAUSD (Shambra) signs contract with John Sepich to design mitigation plan *north* of Colton.
April 30, 1997	Board approves final version of DDA between TBP and LAUSD.
May 2, 1997	*Day Higuchi v. LAUSD* is filed.
May 23, 1997	*Day Higuchi v. LAUSD* preliminary injunction (modified) is issued staying implementation of DDA, which delays start of construction.
May 29, 1997	Law/Crandall May Report concludes there is no methane problem south of Colton, stating that methane was not identified and did not pose a significant environmental concern.
June 11, 1997	Ken Reizes writes to LA Fire Dept. enclosing copy of Law/Crandall May Report.
August 25, 1997	Ground is broken at BLC.
September 1997	Grading and construction begins at BLC.
September 24, 1997	Law/Crandall submits a site methane monitoring plan to Ken Reizes.
November 4, 1997	T/K worker detects presence of hydrogen sulfide south of Colton near Beaudry and Mignonette streets.
December 1, 1997	LAUSD issues $91,400,000 worth of COPS to finance BLC.
December 15, 1997	T/K worker detects more odors south of Colton near Bolyston and Bixel streets.

January 2, 1998	Law/Crandall begins to systematically test for gases south of Colton. Log says "most likely we are reading methane."
January 9, 1998	Ken Reizes asks John Sepich to do a methane survey on property south of Colton.
January 21, 1998	LA Fire Dept. approves Sepich methane mitigation plan for north of Colton and issues permit.
January 21, 1998	Hugh Avery (Sepich rep.) tells Joe Gould of LA Fire Dept. that methane was found south of Colton and further mitigation measures and monitoring were necessary.
February 20, 1998	Sepich submits formal proposal to install up to 12 methane detection probes to further test for gases, including methane, south of Colton.
March 30, 1998	Sepich sends TBP the test results concluding that hydrogen sulfide and methane are present south of Colton.
April 22, 1998	LAUSD retains Sepich to design a methane control system for school buildings south of Colton and Sepich submits his draft to TBP. The plan calls for methane barriers and venting to be placed under the impacted buildings and adjacent paved areas.
April 30, 1998	Sepich begins to design system for south of Colton.
June 3, 1998	Sepich completes design and presents plan to TBP and LAUSD; cost later estimated to be $1.2–$1.5 million.
June 1998	Assemblyman Scott Wildman, chair of State Jt. Legislative Audit Cmte. Held hearing in LA; widely covered by the press.
July 30, 1998	D/K Mechanical provides the lowest bid to T/K and will construct the gas control vent piping for Sepich's mitigation system.
August 5, 1998	Gergen Construction wins the bid to construct the methane barrier part of Sepich's mitigation system.

September 8, 1998	SCS engineers complete peer-review of Sepich's plan.
October 1, 1998	Meeting at LA Fire Dept. to present to LAFD revised design of Sepich system that includes south of Colton. Present: LAUSD, Sepich, TBP, and LAFD Insp. Joe Gutierrez. No approval of Sepich revised system that would have allowed LAUSD to go forward and install mitigation system.
October 8, 1998	DTSC begins environmental review of Belmont at the request of Cal. State Assemblyman Scott Wildman.
November 17, 1998	DTSC concludes Belmont site not properly characterized for possible environmental contamination.
Late 1998	Public concern intensifies over environmental conditions at BLC.
February 1999	Assemblyman Scott Wildman issues Belmont report.
February 22, 1999	LAUSD enters into Voluntary Corrective Action Agreement with DTSC that vests authority to approve all environmental remediation and mitigation measures with DTSC. No approval of Sepich revised system that would have allowed LAUSD to go forward and install mitigation system.
February 23, 1999	Board approves hiring internal auditor (Don Mullinax) to review BLC.
Spring 1999	Three Board members are defeated by BLC opponents in their bid for reelection. Board appoints the Indep. Belmont Comm. to study whether BLC should be completed. Months of testimony before the Board ensues
Spring 1999	LAUSD Board hires new legal counsel, Weston, Benshoof, Rochefort, Rubalcava & MacCuish, retains consultant Wayne M. Sheridan, who directs all subs to deliver all available materials to BLC site prior to July 31, 1999 so they could be included in the July pay application.
June 1999	LAUSD pays contractors and subcontractors all monthly pay applications for work performed in June 1999, but after that all payments stopped.

July 20, 1999	LAUSD Board votes to suspend construction on August 1, 1999; site should be secured (with a $2.2 million cap on expenses) while project was studied. School is 60% complete at cost of $154 million.
September 13, 1999	LAUSD Inspector General issues first volume of critical report addressing environmental issues (*IG Report I*).
September 16, 1999	LAUSD files malpractice lawsuit against David Cartwright and O'Melveny & Myers.
October 1999	Indep. Belmont Comm. votes 4-3 in favor of building school.
November 9, 1999	Board adopts resolution that all work be "suspended indefinitely" as of Nov. 23, 1999.
November 1999	Temple Beaudry Partners terminated.
December 13, 1999	LAUSD Inspector General issues second volume of critical report addressing fraud issues (*IG Report II*).
January 25, 2000	Board with its new membership votes to abandon BLC project.
April 14, 2000	Los Angeles District Attorney's Office sends letter to LAUSD Inspector General announcing declination to prosecute concerning *environmental* issues.
December 12, 2000	Board votes (in closed session) to seek outside bids from contractors in order to complete the Belmont project.
December 20, 2000	Hotel Employees & Rest Employees Union, Local 11, files motion for writ of mandate or prelim. injunction to compel LAUSD to comply with Brown Act.
January 2, 2001	District Attorney's Office Public Integrity Division (PID) opens an investigation of open meetings (Brown Act) issue re LAUSD and BLC decision-making, focusing particularly on the Board's closed meeting on December 12, 2000.

January 4, 2001	PID sends LAUSD Supt. Romer and Board a written demand to correct or cure the actions taken re closed sessions on BLC.
January 17, 2001	PID deputies meet with LAUSD general counsel to further discuss LAUSD compliance; as a result, LAUSD commits to holding a re-vote on issuing requests for proposal.
	LAUSD notices open meeting on re-vote of Dec. 12, 2000 decisions.
February 2001	District Attorney forms the Belmont Task Force.
March 2001	LADA hires environmental expert Geomatrix Consultants to provide an independent, technical review of BLC project environmental documents and to collect and analyze soil and soil vapor samples from the BLC site. Its purpose is to assist the Office in making informed decisions about environmental conditions and mitigation issues at the BLC site.
March 27, 2001	Union Local 11's writ denied on grounds that LAUSD had cured any Brown Act violation.
June 7, 2001	Arbitration Opinion, *LAUSD v. TBP et al.* in favor of TBP, Turner/Kajima, etc. in contract dispute with LAUSD. Opinion finds $17 million is owned to developer, subs, architects and others.
August 2001	Geomatrix issues its report.
August 20, 2001	California's Fair Political Practices Commission concludes no Political Reform Act violations by Cartwright.
January 24, 2002	Summary Judgment Decision against LAUSD in malpractice lawsuit, *LAUSD v. David Cartwright, et al*.
February 7, 2002	LAUSD Supt. Romer eliminates 1 of the 3 bidders to develop BLC on the basis that the company had access to inside information. The project might run as high as $88 million which includes: sealing off hazardous underground vapors from the former oil field, installing an elaborate system of vents, air scrubbers and detectors, and paying $7 million for a 30 year insurance policy to safeguard the school district against lawsuits.

March 12, 2002 Board authorizes contract negotiations to begin with Alliance for a Better Community to complete construction of BLC.

August 6, 2002 Appellate Court dismisses LAUSD appeal of arbitration award concerning subcontractor false claims.

September 24, 2002 The IRS concludes that LAUSD had properly used COPS as an effective method of financing BLC construction. The IRS had issued a preliminary finding letter disallowing the tax-exempt status of the COPS one year earlier.

December 4, 2002 LAUSD Superintendent Romer announces that seismologists recently discovered an earthquake fault running beneath two buildings at BLC. Scientists have not been able to determine whether the fault is active or not, but have concluded that the District should assume that it is active. State law prohibits the construction of schools within 50 feet of active faults. Further, Supt. Romer concludes that LAUSD would halt negotiations and planning for BLC's construction, in its *current configuration*, because of seismic concerns. Romer outlines several possible alternatives, including construction of a viable high school on the property using a reconfigured arrangement of school buildings.

APPENDIX B

Organizational Chart: Belmont Participants

Belmont Participants

State Executive

Department of Toxic Substance Control (DTSC)
Division of Oil & Gas

Legal Consultants

O'Melveny & Myers
- David Cartwright

Orrick Herrington
- Bond Counsel for COPS

Weston, Benshoof, Rochefort, Rubalcava & MacCuish
- Construction and environmental issues
- Hired Wayne Sheridan investigated false claims

McClarand , Vasquez & Partners (MVP), Architect

Ernesto Vasquez, Architect

LAUSD

Temple Beaudry Partners (TBP) Dev./Builder

Partners:
- Kajima Urban Development
- Turner Construction
- The Related Partners (Dan Neiman)
- Gateway Science and Engineering (Art Gastelum)
- Legaspi & Company (Joe Legaspi)
- McClarand, Vasquez & Partners (Ernesto Vasquez)

Kenneth J. Reizes, Project Executive

Turner/Kajima General Contractor

Subs:
- BMP Concrete
- Downey Elec.
- Keenan Hopkins
- Rucker Tile
- Queen City Glass
- Winegardner Masonry

Board

Superintendent
CFO Henry Jones
GC Richard Mason
CAO David Koch
Dominic Shambra, Director, Office of Planning & Dev't
Ray Rodriguez, Deputy
Angelo Bellomo, Director, Environmental Health & Safety
Richard Lui, Sr. Env. Health & Safety Department
Don Mullinax, Office of Internal Audit & Spec. (now Office of IG)

Other Consultants

Design Oversight Committee
Evaluation Committee
Safety Team
Paul Hurley of Daniel, Mann, Johnson, Mendenhall (DMJM)

State Legislature

Joint Legislative Audit Committee (JLAC)
–Scott Wildman, Chair

Environmental Consultants

McLaren Environmental Eng.
Law/Crandall
El Capitan
Environmental Strategies Corp. (ESC)
Methane Specialists (John Sepich and Hugh Avery)
SCS Engineers
Advanced Geo-environmental Inc.
Remedial Mgmt. Corp.
ENV. America
Intera, Inc.
Grayson Services

APPENDIX C

Photos of:
Belmont High School circa 1940s with oil derrick
Belmont under residential use in 1979
Belmont under construction in 1998

Belmont HS 1940's


TEMPLE ST.
BOYLSTON ST.
COLTON ST.
BEAUDRY AVE.
TOLUCA ST.
1ST STREET
Belmont Learning Complex site
May 12, 1979


TEMPLE ST.
BOYLSTON ST.
BEAUDRY AVE.
COLTON ST.
TOLUCA ST.
Belmont Learning Complex
October 18, 1998
1ST STREET